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CR 1: VICTIMS' RIGHTS

1. Selected Definitions

A. "Child" is person who is less than 18 years of age, except as provided in § 950.02(3)

B. "Family member" is spouse, minor child, adult child, sibling, parent, or legal guardian

C. "Victim" is any of the following

D. "Victim" does not include the following

E. "Victim advocate" means an individual who is an employee of or volunteer for an organization the purpose of which is to provide counseling, assistance, or support services free of charge to a victim

2. Constitutional Rights

A. Crime victims have the following rights during the criminal and juvenile justice process

B. Victims are not afforded party status to a case

C. Victims' rights shall be protected in a manner no less vigorous than the Def's, but may not supersede a Def's federal constitutional rights

3. Consultation Requirements

A. Ct to inquire whether DA has complied with consultation requirements of victims' rights law

4. Court Action

A. Ct must consider interest of victims before granting continuance

B. If requested by victim, Ct must allow victim to make a statement at sentencing

C. Ct must allow victim to attend all proceedings involving the case

D. Ct shall order restitution to victim

E. Ct must allow service representative to accompany victim of abusive conduct, other than when victim is testifying or is represented by counsel, and may allow service representative to address Ct on behalf of victim

F. Victim advocate may accompany victim of sexual assault, child sexual assault, human trafficking, and related offenses at law enforcement interviews, prosecution interviews, department of corrections proceedings, Ct proceedings, and postconviction proceedings

G. Cty must provide separate waiting room for victims or, if not practical, other means to minimize contact with Def

5. Standing

A. Crime victim has standing to assert rights in any Ct in Cty in which alleged violation occurred or may ask DA to act

B. Crime victim or Atty may assert and seek in any Ct enforcement of any right and the Ct shall act promptly and afford a remedy

C. Crime victim may obtain review of adverse decisions by filing petition for supervisory writ with appellate Cts

CR 2: INTERPRETERS

1. When Should an Interpreter Be Appointed?

A. In all proceedings, if Ct determines that person has limited English proficiency and that interpreter is necessary

B. If Ct is recipient of any type of federal funding through any source, it must comply with Title VI of the Civil Rights Act, which prohibits discrimination on the basis of national origin

C. Waiver of interpreter

2. Suggested Voir Dire to Establish Need for an Interpreter

A. Elaborate hearing unnecessary

B. Suggested questions:

3. Who Is a Qualified Interpreter?

A. A “qualified interpreter” is able to:

B. Interpreter must be qualified and sworn as an expert. See infra Sec. 4

C. Any party may object to use of a particular interpreter and Ct may remove for good cause (See infra Sec. 9—Suggested Voir Dire of Interpreter Qualifications)

D. Delay resulting from the need to find a qualified interpreter may constitute good cause to toll time limitations

E. Supreme Ct must establish policies for recruitment, training, certification, and discipline of Ct interpreters. A list of certified interpreters is available online at https://www.wicourts.gov/services/interpreter/search.htm

4. Interpreter Oaths

A. Interpreters at trial must take oath that they will correctly interpret all proceedings

B. Sign language interpreters who accompany jurors into the jury room need an additional oath

5. Cost of Interpreters

A. Interpreters provided at public expense:

B. Who pays

C. Out-of-Ct services

6. Use of Interpreters

A. Before going on the record, be sure the interpreter and witness/party are able to communicate

B. By telephone or audiovisual means

C. Multiple interpreters: Ct may appoint more than one qualified interpreter when necessary

D. Interpreter for juror

E. Instruction to Jury

F. Privilege and hearsay

G. Caution: Shackling disruptive deaf Def may hamper ability to communicate

7. Introducing Recorded Evidence in English or Non-English Language

A. Typically this involves documents, voice recordings, or videos in non-English to be translated into English; OR similar items in English to be translated into a non-English language. Examples include 911 call recordings, police interview recordings, and surveillance recordings

B. Ct may require a lengthy writing in non-English to be accompanied by a written translation into English with attached affidavit by the translator stating qualifications to perform translation and certifying it is true and correct

C. If Ct asks interpreter to interpret recorded evidence in English, best practice is for Ct to allow interpreter to become familiar with the recorded evidence and provide a transcript

8. Court Interpreter Code of Ethics

A. Applies to:

B. Interpretation must be complete and accurate

C. Interpreter must accurately disclose qualifications and experience

D. Interpreter must be impartial and unbiased

E. Interpreter must maintain a professional demeanor

F. Confidentiality and restriction on public comment

G. Interpreter shall not:

H. Interpreters must:

9. Suggested Voir Dire of Interpreter Qualifications

A. Suggested questions to establish an interpreter's qualifications:

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B. Preliminary instruction: use of an interpreter for a juror

C. Preliminary instruction: use of an interpreter for the Def

CR 3: COUNSEL

1. Right to Counsel

A. Def has right to Atty at any proceeding in which there is possibility of incarceration

B. Right to counsel extends to all "critical" stages

C. Right to counsel is offense-specific

D. Indigent Def has right to counsel appointed at public expense

E. Def has concomitant constitutional right to represent self

2. Appointment of Counsel

A. State Public Defender (SPD) is primary, but not exclusive, means for assuring counsel to indigents

B. Ct has inherent power to appoint counsel when SPD declines to act and Ct determines appointment is necessary

C. Change of appointed Atty is in Trial Ct's discretion

3. SPD Appointment of Counsel

A. Based on rules promulgated under § 977.02(3) relating to income, assets, and anticipated cost of effective representation

B. Ct may review any indigency determination on own motion or that of Def and shall review determination on motion of DA or SPD

C. Cost of out-of-Ct interpreter hired by defense counsel is charged to SPD

4. Judicial Appointment of Counsel

A. Ct cannot restrict itself to criteria mandated by statute for appointment of SPD

B. Standard: Does Def have sufficient income/assets to retain private counsel at market rate prevailing in community?

C. Relevant considerations

5. Managing Conflict of Interest

A. Def has right to separate counsel from co-Def, if interests of Defs in conflict

B. Ct may disqualify counsel of Def, even over accused's objection and apparent waiver of right to conflict-free representation, when actual or serious potential for conflict of interest exists

C. Prosecuting Atty should never be appointed to represent indigent Def

D. Municipal Atty (even part-time) should rarely be appointed

6. Procedure for Ct Determination of Indigency

A. If Def claims inability to afford counsel but is ineligible for SPD

B. Determine whether Def is indigent

C. If Ct finds Def indigent

7. Substitution or Discharge of Counsel

A. Indigent Def entitled to competent counsel, but not counsel of own choosing

B. Substitution of counsel within discretion of Ct

C. Make inquiry of Def if Def at any time makes substantial complaint that could reasonably be interpreted as request for new counsel

D. Consider following factors

E. Trial Ct to strike proper balance between constitutional rights of Def and efficient administration of justice

8. Waiver of Right to Counsel

A. At plea of no contest or guilty

B. To represent self at trial

C. Forfeiture of counsel explicitly or by conduct

9. Standby Counsel

A. For convenience of Trial Ct, not Def

B. When there is doubt that Def has ability to represent self, Atty can be appointed to

C. Standby Atty can also protect rights of Def if Def removed from courtroom for misconduct by resuming full representation

D. Ct may impose fees on Def under certain circumstances

10. Out-of-State Counsel

A. Out-of-state counsel not a violation of SCR 10.03(4) if local counsel also appears and participates

B. Local counsel must be available, not necessarily present, at every stage of trial

CR 4: REMOTE PROCEEDINGS

1. Live Audiovisual/Telephonic Proceedings

A. Ct may conduct live audiovisual/telephonic proceedings for any proceeding under Chs 968–973

B. Requirements

C. Same effect as personal appearance in Ct

D. Interpreter may appear remotely

E. Def's presence in Ct with Def Atty on telephone during plea colloquy has been held not to presumptively violate 6th Amendment right to effective assistance of counsel

F. Witnesses via videoconferencing technology at evidentiary hearing, trial, or fact-finding hearing

G. See CR 33, Defendant Presence/Disruption, Sec. 1.A., for proceedings when Def has right to be present at proceeding either personally or by telephone or live audiovisual means

2. Requirements of Videoconferencing Technology

A. Participants must be able to hear, see, and communicate with each other

B. Participants must be able to hear, see, and otherwise observe any physical exhibits or evidence

C. Adequate video/sound quality as if in courtroom

D. Ability for courtroom cameras to scan the courtroom

E. Option for counsel to be present with Def at remote location and ability to mute microphone system to allow for private communication

F. Means to transfer documents between courtroom and remote location

G. Private voice communication facility if Def and counsel are not in same location to allow for private communication

H. Proceeding must be visible and audible to jury and public to same extent as if proceeding were not by videoconference

3. Criteria to Consider When Ct Exercises Discretion to Allow Videoconferencing Technology

A. Undue surprise/prejudice

B. Efforts to procure witness physically

C. Convenience and cost

D. Full cross-examination/use of exhibits

E. Importance of physical presence for truthful testimony

F. Physical liberty or fundamental interest involved

G. Ct's control over remote location

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K. Stipulations and waivers by parties for video appearance

CR 5: PUBLIC TRIAL

1. Open Court in General

A. Legislature and Cts are reluctant to shield judicial process from public view

B. Open Ct protects Def's rights—closing courthouse doors during trial requires new trial

C. Open Ct assures public that judicial officials and justice system are operating properly

2. Right to Attend

A. Constitutional and statutory right of

B. All sittings of Ct, whether in chambers or in courtroom are presumptively open to public. Includes

C. Permissive right of news media, when

3. Motion to Close Pretrial Proceedings

A. Both State and Def may move to close pretrial proceedings

B. Burdens of parties making motion

C. Public or news media have right to be heard on closure request

D. Motion addressed to sound discretion of Ct

E. Postconviction motions challenging closure of courtroom

F. Specific proceedings

4. Restriction of Extrajudicial Statements

A. Ct has inherent power to restrict extrajudicial statements of Attys, parties, witnesses, Ct officials, and police

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WARRANTS

1. Arrest Warrant

A. May be signed by Judge or Circuit Ct Comm’r and all references to Judge in this section include both

B. Must be based on complaint

C. When issued

D. Mandatory provisions

2. Search Warrant

A. Definition

B. Basis for Issuance

C. Procedures for Issuance

D. Property subject to seizure

E. Search warrant may authorize search of unnamed persons on premises to be searched as long as basis in affidavit

F. “No-knock” warrants

G. “Anticipatory” warrants

3. Probable Cause Necessary for Arrest or Search Warrant

A. Equated with “a fair probability”

B. “Stale” facts not sufficient to support search warrant

SUBPOENAS

1. Definition

A. Writ for compelling attendance of person before Ct or other tribunal at time and place designated

B. Witness cannot disregard authority of Ct before which summoned

C. Propriety of subpoena for Ct to decide

2. Statutory Authority

A. Cts of record have power to issue subpoenas requiring attendance of any witness residing or in State to testify in any matter

B. May command person to produce books, papers, documents, electronically stored information, or tangibles designated

C. Ct may quash, modify, or conditionally approve subpoena upon prompt motion

D. Upon satisfactory proof of Def's inability to procure witness for defense, Judge may direct witness to be subpoenaed as necessary and proper upon Def's or Atty's oath or affidavit

E. If subpoenaed witness fails to appear, Ct may issue bench warrant

F. In a felony case, upon affidavit showing witness's testimony is material and that it is impracticable to serve subpoena, Ct may issue a material witness warrant and require witness to post bail

G. In an out-of-state case, upon receipt of certification of out-of-state Judge that the person is a material witness to a criminal prosecution or grand jury proceeding, Wis Ct to set hearing on whether witness must appear in other state

3. Constitutional Compulsory Process

A. Def entitled to compulsory process to obtain witnesses in own behalf

B. Witness in criminal case may be properly served with subpoena by:

4. Subpoena Duces Tecum

A. Subpoena commanding production of books, papers, documents, electronically stored information, or tangibles designated

B. Disclosure sought shall not be unreasonable

C. When factual dispute on relevancy arises, must present evidence to Ct

5. Subpoena for Documents

A. "Documents" includes, but is not limited to, books, papers, records, recordings, tapes, photographs, films, or computer or electronic data

B. AG or DA may request a subpoena for documents

C. Ct shall issue subpoena and documents shall be returnable to the Ct

D. Motions, including to quash or limit the subpoena, must be heard by issuing Ct

E. Production of documents may be compelled by finding of contempt

6. Electronic Records and Devices

A. Interception of Wire, Electronic, or Oral Communications

B. Pen Registers/Trap and Trace Devices

C. Warrant to Track a Communications Device

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CR 7: INITIAL APPEARANCE

1. Probable Cause Finding Before Initial Appearance—Riverside Review

A. Fourth Amendment requires a prompt judicial determination of probable cause as prerequisite to extended pretrial detention

B. For Def arrested without warrant, probable cause finding must be made by Judge or Ct Comm'r no later than 48 hours after arrest (weekends and holidays included)

C. 48-hour rule does not apply if probation/parole hold in effect or if already in lawful custody on an unrelated matter

D. Motion to dismiss should not be granted on event of non-prejudicial Riverside violation

E. Probable cause determination does not involve any adversarial rights and can be based entirely on hearsay and written testimony

F. Def has no right to be present when judicial officer makes probable cause determination

G. Consider it the same as an application for a warrant

2. Conducting the Initial Appearance

A. Shall be conducted "within a reasonable time" after arrest

B. If person arrested without warrant and brought before Judge, complaint filed forthwith

C. Def may waive physical appearance and request that initial appearance be conducted on the record by telephone or live AV means

D. Review factual portion of complaint to determine probable cause that the Def has committed the charged offense(s)

E. Inform Def of charge(s)

F. Give Def copy of complaint

G. Advise as to penalties if felony—Ct's failure to do so may be harmless error if no prejudice to Def

H. Inform Def of right to counsel and, if offense punishable by incarceration, at public expense, if eligible

I. If misdemeanor charges, ask Def how Def pleads to charge in complaint ("instant arraignment")

J. Set bail/bond and conditions of release pursuant to Ch 969. See CR 8 (Bail/Bond/Conditions of Release)

K. If not already obtained by police, direct that fingerprints, photographs, and other identifying data be obtained if Def charged with

L. If Def charged with violent crime under § 165.84(7)(ab), determine whether DNA was taken

M. If felony, Def entitled to prelim

N. Schedule prelim

3. DNA at Arrest Violations

CR 8: BAIL/BOND/CONDITIONS OF RELEASE

1. Setting Bail/Bond

A. Bail: Monetary condition of release designed to ensure Def will appear as required and will comply with bond conditions

B. Bond: Undertaking by which Def agrees to comply with conditions of release

C. Hearing

D. Options

E. Standards for Setting Bail (if not charged with Violent Crimes under § 969.001(3))

F. Standards for Setting Bail (if charged with Violent Crimes under § 969.001(3))

G. Other Considerations in Setting Bond/Bail

H. Conditions of Release

I. When conditions of bond can be enforced

J. Additional orders

2. Reviewing Bail

A. Same statutory and traditional considerations as above

B. Ct may consider violations of conditions of release as grounds to set or increase bail or modify conditions

C. Upon petition of either State or Def

D. Reasonable notice of review must be given to opposing party

3. Revocation of Bail for Commission of Serious Crime

A. Written petition from DA required, alleging

B. Upon petition, Ct may issue warrant to bring Def before Ct

C. Revocation hearing

4. Revocation of Bail for Victim/Witness Intimidation

A. After hearing and upon substantial evidence of intimidation, any form of pretrial released can be revoked and/or bail forfeited

B. Applies whether Def acted personally or behavior was caused or encouraged by Def

5. Forfeiture of Bail

A. Bail shall be forfeited if conditions of bond not complied with

B. By entry of order declaring bail forfeited

C. Upon motion of DA, or sua sponte if justice so requires, Ct must enter judgment for State for amount of bond if Def does not surrender

D. While forfeiture is mandatory upon a violation of a condition of bond, decision to set aside forfeiture is subject to Ct's discretion

E. Sureties may be discharged from bond obligations if

F. Forfeited cash bail to be applied FIRST to pay recompense to victim

6. Denial of Bail (Preventative Detention)

A. Ct may deny release to

B. Prehearing procedure

C. Pretrial detention hearing

D. Findings

E. Def may petition for release in accordance with § 969.03 at any time

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7. Bail After Conviction

A. When release available

B. Bail not available

C. Procedure for release on bail pending postconviction relief

8. Disbursement of Bail After Conviction

A. Cash bail must be applied FIRST to pay restitution to victim; remainder then is applied toward costs and fines

B. If case dismissed, even if read in, cash bail must be returned and may not be applied to restitution, costs, and fines imposed in other cases

9. List of Violent Crimes for Purposes of Bail Under § 969.001(3)

CR 9: PRELIM/ARRAIGNMENT

PRELIMINARY EXAMINATION

1. Nature of Preliminary Examination

A. Purpose

B. Standard

C. Right to prelim is statutory but implicates certain constitutional rights

D. Prelim not required when

2. Waiver
   A. Advise Def of rights and benefits of prelim
   B. See Wis JI-Cr SM-31 for suggested colloquy
   C. Finding of waiver
   D. Actions of Ct after waiver
3. Time Limitations
   A. Prelim must be commenced
   B. Violation of time limitations
4. Procedure
   A. In general
   B. Rules of evidence apply as at trial with exceptions
   C. Def has right to
   D. Def does not have right to
   E. Function of Ct—single and multiple related counts
   F. Function of Ct—multiple unrelated counts
   G. Probable cause
5. Conclusion of Hearing
   A. Bind Def over for trial if probable cause to believe Def committed a felony
   B. If probable only misdemeanor committed, amend complaint to conform to evidence
   C. If no probable cause found for any crime, order dismissal without prejudice
6. Juveniles
7. Review
8. Errors

ARRAIGNMENT

1. Information Filed
   A. Information must be filed within 30 days after decision to bind over
   B. Information may allege additional charges, not heard at prelim, so long as “transactionally related”
   C. Information alleging completely new charges (not containing any original charges) must be supported by sufficient evidence at prelim to show probable cause Def committed those new offenses
2. “Instant Arraignments”
3. Duties at Arraignment
   A. Arraignment must be in open Ct
   B. Inform unrepresented Def of right to counsel
   C. Deliver copy and read information to Def, unless waived
   D. Ask how Def pleads to charge
   E. Enter plea of not guilty, if Def stands mute
   F. Accept plea or schedule trial or other necessary hearings
   G. Set time for filing written motions
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CR 10: DISCOVERY AND INSPECTION

1. General

A. Wisconsin recognized no "clear legal right" to pretrial discovery before 1970 Criminal Code

B. Limited discovery and inspection now statutorily provided

C. Additional discovery required as matter of due process, when

D. Atty-client privilege and work-product doctrine limit State's discovery rights

2. Timing of Statutory Discovery Motions

A. Felonies

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3. Types of Statutory Discovery Provided

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B. Duty of Def to disclose within a reasonable time before trial

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A. Prosecution has duty to preserve exculpatory evidence

B. Sanction within Ct's discretion

7. Postconviction Discovery Issues

A. To obtain postconviction discovery of physical evidence, Def must show that evidence sought is "consequential" to issue in case

B. Def's due-process rights are violated by posttrial destruction of evidence and new trial is required, if evidence destroyed was

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CR 11: DEPOSITIONS OF WITNESSES

1. Adult Witnesses

A. Witness must in fact be unavailable to testify at trial

B. State must make good-faith effort to obtain presence at trial

C. Testimony of witness must be competent, relevant, material, and necessary to prevent failure of justice

D. Procedure

2. Child Witness—Audiovisually Recorded Depositions

A. Upon motion of either party and after notice and hearing Ct may order deposition of child witness to be taken by audiovisual means if trial or hearing will commence

B. Special audiovisual recording procedure may only be ordered upon finding that particular child under particular circumstances of case requires special procedure as protection from trauma

C. Factors Ct may consider in determining interests of justice

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CR 12: COMPETENCY TO PROCEED

1. Definitions

A. Def lacks substantial mental capacity to understand proceedings or assist in defense

B. Legal objections to prosecution under § 971.31 may be heard regardless of incompetence, provided

2. Raising Issue of Competency to Proceed

A. Sec. 971.14 competency issue can be raised at any stage of criminal proceedings

B. Ct must have reason to doubt Def's competency

C. Ct shall proceed under § 971.14(1r)(a) whenever there is reason to doubt Def's competency to proceed

3. Determination of Probable Cause

A. Purpose: To avoid unnecessary competency proceedings when charge not supported by probable cause

B. Alternative procedures to establish probable cause

C. Disposition after probable cause determination

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A. Inpatient examinations

B. Outpatient examinations

C. Examination by DHS

D. Examiner's duties

E. Contents of examination report

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H. Def may refuse medication or treatment, unless necessary to prevent physical harm to self or others

5. Competency Hearing

A. Summary hearing and waiver

B. Evidentiary hearing

6. Competency Hearing Disposition (For Postconviction, See Sec. 10)

A. If Ct finds Def competent, criminal proceedings resume

B. If Ct finds Def not competent and NOT LIKELY to become competent within 12 months or maximum sentence specified for most serious offense with which Def is charged, whichever is less

C. If Ct determines Def not competent but LIKELY to become competent within 12 months or maximum sentence specified for most serious offense with which Def is charged, whichever is less

D. Circuit Ct lacks authority to toll the statutory time period to bring Def to competency

E. Involuntary Medication

F. Def cannot waive defense of incompetency to stand trial

7. Subsequent Hearings to Reevaluate Def's Competency

A. Examinations

B. Hold a hearing within 14 days after receipt of report stating Def has regained competency or is not competent and is unlikely to become competent in remaining commitment period

C. Dispositions upon rehearing

D. Relapses into incompetency

8. Discharge from Criminal Commitment

A. After 12 months or maximum sentence for most serious charge, whichever is less

B. Whenever Ct determines Def unlikely to regain competency within maximum allowable commitment time

C. Ct may order Def to reappear in Ct at specified intervals for redetermination of competency

D. Ct may order transfer to civil proceedings

9. Transfer to Civil Proceedings

A. Ct may order Def committed to

B. Continued detention of Def governed by § 51.15, § 51.45(11), or § 55.135, as appropriate

C. DA may prepare statement that alone will suffice as a petition for commitment or protective placement

D. Ct may transfer case to branch of Circuit Ct exercising jurisdiction under Ch 51

E. Days spent in commitment or protective placement do not establish sentence credit

F. If Def committed under § 51.20 pursuant to petition

G. DA or Def's Atty may move Ct for redetermination of competency

H. See Probate Benchbook, MH 1, for full discussion of involuntary commitments

10. Postconviction Relief Proceedings

A. Competency should be determined by Ct when it has reason to believe Def is

B. May be raised by State, Def's counsel or Ct sua sponte

C. Method of evaluation left to Ct's discretion

D. If hearing necessary, Ct should be "guided" by § 971.14(4) as much as possible

E. If Def found incompetent, Ct should consider

11. Probation Revocation Proceeding

A. Probationer has due-process right to competency determination when ALJ has reason to doubt probationer's competency during probation revocation proceedings

B. When ALJ has reason to doubt probationer's competence to proceed, Circuit Ct in Cty in which probationer was sentenced should make competency determination

C. Competency proceeding should adhere to §§ 971.13 and 971.14 to extent practicable

D. Habeas may be used to return issue to Circuit Ct for review

CR 13: TAKING A PLEA

1. Procedure for Taking a Plea

A. Def present in person in Ct unless:

B. Ct to inquire whether DA has complied with consultation requirement of victims' rights law

C. Felony

D. Plea Agreement

E. Record must affirmatively show that Trial Judge personally addressed Def and determined that

F. Areas of inquiry of Def by Ct

G. Ct must then be provided with factual basis for plea that has been entered

H. If repeater alleged, must be proved or admitted

I. Ct must be satisfied that Def committed the crime and/or any other special conditions and make a finding of such. Special conditions include repeater allegations, number of prior convictions, enhancer allegations, and Alford plea circumstances

J. Order preparation of PSI, if one to be made (in discretion of Ct)

K. Ct must inquire whether DA complied with consultation requirement of victims' rights statute, § 971.095(2)

L. If proceeding to sentencing immediately:

M. Have written judgment of conviction executed and filed

2. Vacating Plea After Acceptance

A. Ct may vacate guilty or no contest plea sua sponte only when it finds that there was fraud in procuring plea or that party intentionally withheld from Ct information that would have induced Ct not to accept plea

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A. Plea of guilty

B. No contest/nolo contendere plea

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D. Conditional pleas with right to appeal adverse pretrial rulings not allowed except

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A. Waived defects include constitutional claims

B. Rule is one of administration and does not involve power to address the issues raised

C. Double jeopardy waived unless violation is apparent from the record

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A. “Judge” includes Ct Comm’r

B. No cause necessary for substitution

C. Time and procedure for filing request

D. Limitations

2. Substitution of Trial Judge

A. No cause necessary for substitution

B. Time for filing request

C. Waiver of request for substitution

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B. Judge’s duties

C. Sanctions for failure to recuse self

D. Waiver of sua sponte recusal allowed, provided

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B. Constitutional right to impartial and unbiased Judge

CR 15: CHALLENGES TO SUFFICIENCY OF COMPLAINT/DOUBLE JEOPARDY

1. Timeliness of Motion Challenging Complaint

A. Misdemeanor: Must be made within 10 days after initial appearance

B. Felony: Must be made before preliminary examination

C. Objection deemed waived if not timely made

2. Standards for Review of Sufficiency of Complaint

A. Complaint that alleges no crime is void and gives Ct no jurisdiction

B. Complaint, within its 4 corners, must answer 5 “W’s”

C. Complaint must contain “essential facts” constituting offense charged and possible penalty that may be imposed upon conviction

D. Complaint must be minimally adequate based on common sense, not hypertechnical evaluation of essential facts establishing probable cause

E. Complaint must contain sufficient information, reliably reported, together with reasonable inferences, that cause Ct to form reasonable belief that Def probably committed crime charged

F. If reasonable inference may be drawn establishing probable cause and equally reasonable inference to contrary, complaint sufficient

G. Fair-minded magistrate must conclude that facts and circumstances alleged justify further proceedings and charges not merely capricious

H. Def must be able to determine

I. Reliability of information reported in complaint

J. Ct has no inherent power to dismiss legally sufficient complaint absent statutory authorization, prosecutorial request, or constitutional violation

K. Ct cannot substitute its judgment for that of DA as to appropriateness of charge

3. Specific Challenges to Complaint

A. Sufficiency of alleged time of offense

B. Element missing from complaint

C. Repeater allegation and penalty enhancer

D. Multiplicity—Single offense charged in multiple counts—Two-prong test (See Sec. 5, infra)

E. Duplicity—Charging several distinct and separate offenses in a single count

F. Vindictive Prosecution

G. Immunity from Prosecution in Overdose Cases

4. Motion to Dismiss Based on Critical Misstatements or Omissions in Complaint

A. Preconditions to holding hearing on motion

B. Standard of proof at hearing

C. No hearing required if

5. Double Jeopardy

A. Wis Supreme Ct accepts decisions of U.S. Supreme Ct as controlling interpretations of Double Jeopardy provisions of both U.S. and Wis Constitutions

B. Def must establish double jeopardy violation beyond a reasonable doubt

C. Jeopardy attaches when:

D. Double Jeopardy Clause protects against

E. Multiplicity—Single offense charged in multiple counts—Two-prong test

F. Multiple Prosecutions

G. Issue preclusion (formerly known as collateral estoppel)

H. Dual sovereignty doctrine permits one act that violates the laws of two states to be punished in both states

CR 16: SPEEDY TRIAL

1. Constitutional Protection

A. Federal authority

B. State authority

C. Speedy trial concern attaches at time of arrest or when Def officially accused of crime, whichever occurs first

D. Determination of deprivation

E. Remedy for violation of constitutional right to speedy trial: Charges are dismissed

2. Statutory Protection

A. Misdemeanor

B. Felony

C. Continuance

D. Waiver

E. Remedy for violation of statutory right to speedy trial

3. Interstate Detainers

A. Created by detainer statutes. See CR 44

CR 17: PERSONAL JURISDICTION/PLACE OF TRIAL

PERSONAL JURISDICTION

1. Personal Jurisdiction Depends on Physical Presence Before Court

A. Physical presence pursuant to

B. However, unlawful arrest does not deprive Trial Ct of personal jurisdiction

C. Essential element of personal jurisdiction is sufficiency of complaint, not validity of arrest

D. Purposes served by personal jurisdiction

E. If initial appearance conducted on record by telephone or live audiovisual means, Def may waive physical appearance

F. Fact that crime committed outside Wis is fatal to personal jurisdiction of Ct

G. Ct has no jurisdiction after a proper discharge from probation even if not all Ct-ordered conditions have been fulfilled

H. See Issuing Warrants/Subpoenas, CR 6, this volume, for discussion of probable cause to arrest

2. Challenge to Personal Jurisdiction of Court

A. Objection must be preserved

B. Entry of plea without reserving objection waives following attacks on personal jurisdiction

C. Felonies

D. Def waives right to claim loss of personal jurisdiction if Def selects course of action that causes defects in jurisdiction

E. Statutory time limits for commencement of prelim do not apply or affect jurisdiction of Ct after remittitur from interlocutory appeal

PLACE OF TRIAL

1. Venue

A. Venue, generally

B. Def has constitutional and statutory right to change of venue when community prejudice will make fair trial impossible

2. Change of Place of Trial

A. Decision to move to change place of trial is tactical decision under control of defense counsel

B. Timeliness

C. Form and contents

D. Def's burden of proof

E. Test for granting motion

3. Factors to Be Considered by Court When Motion for Change of Place of Trial Made

A. Inflammatory nature of publicity

B. Degree to which adverse publicity permeated area from which jury panel would be drawn

C. Jurors' familiarity with publicity

D. Timing and specificity of publicity in relationship to time of trial

E. Degree of State participation in dissemination of publicity

F. Publication of inadmissible information

G. Severity of offense

H. Degree of care exercised in voir dire by Def

I. Degree of care exercised and amount of difficulty in selecting jury

J. Availability of less drastic remedies

K. Check district rules for practical considerations in changing place of trial

4. Consequences of Granting Motion

A. Trial may be held in Cty where fair trial can be had

B. Or, jury selected from another Cty in lieu of change of venue, provided

C. If Ct elects to choose jury from another Cty

D. Judge ordering change of venue must preside at trial

E. Pretrial preliminary matters may be conducted in either Cty

F. Judge must decide in which Cty Def to be held, if Def in custody

G. Judge must decide in which Cty record to be kept

H. Once change of venue granted, Ct may change place of trial more than once

5. Renewing Motion for Change of Place of Trial

A. Def may reassert motion if reasonable probability of community prejudice has developed

B. Another change of place of trial is required when fair trial cannot be had in second Cty

CR 18: MOTION FOR JOINDER (CONSOLIDATION) OR SEVERANCE

1. General Principles of Joinder and Severance Essentially the Same

A. Ct must balance potential prejudice of joinder with considerations of judicial administration

2. Joinder of Crimes

A. Sec. 971.12(1) to be construed broadly in favor of initial joinder

B. Joinder at charging stage

C. Consolidation for trial

3. Severance of Crimes

A. If joinder proper under § 971.12, Def has burden of proving prejudice to Def in order to gain severance

B. Prejudice to Def

C. No prejudice to Def need be shown if charging document joins offenses that should not be joined under statute

D. Severance not required if:

E. Standard for review is erroneous exercise of discretion by Trial Ct

F. If acquitted, Def who consented to severance cannot assert issue preclusion in second trial

4. Joinder of Defendants

A. Two or more Defs may be charged in same complaint or information if alleged to have participated in same act or transaction or series of acts or transactions constituting one or more crimes

B. Can be tried together in Ct's sound discretion, if alleged offenses arise out of same transaction provable by same evidence

5. Severance of Defendants

A. Mandatory severance

B. Discretionary severance

C. Severance during trial itself

6. Trial Practice Option

A. Trial Judge may wish to consider conducting one trial with totally separate juries for each severed Def

CR 19: SUPPRESSION—SEARCH AND SEIZURE

1. Warrant Requirement

   A. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized

   B. Exceptions to suppression—Suppression not required if

2. Procedure

   A. Motion to suppress must be made within 10 days after initial appearance in misdemeanor or within 10 days after arraignment in felony

   B. Hold an evidentiary hearing only if Def's motion presents more than conclusory allegation and shows factual dispute

   C. Right to confrontation does not apply during suppression hearing

   D. Ct should make findings of fact and conclusions of law on record after pretrial evidentiary hearing

3. Use of Suppressed Evidence

   A. Otherwise inadmissible physical evidence may be used to impeach Def's trial testimony under limited circumstances

   B. Otherwise inadmissible statement of Def, if made voluntarily, may be used to impeach Def at trial. See CR 21, Sec. 1.C.

   C. Evidence suppressed at trial may be relied on at sentencing

4. Expectation of Privacy (Standing)

   A. Ct must answer 2-part question

   B. Def has burden of showing legitimate expectation of privacy

   C. Expectation must be that of Def (not co-Def, co-conspirator, or 3rd party)

   D. Situations in which Ct has recognized expectation of privacy

   E. Factors to consider in determining expectation of privacy

   F. Electronic data and devices

   G. Privacy interest depends on place searched

   H. Private search vs. government search

5. Challenges to Warrants

   A. Challenge to truthfulness of affidavits in support of issuance of warrants

   B. Defective warrants

   C. Issuance by unauthorized person

   D. Motion to suppress challenging probable cause

   E. Warrant may be based on illegally obtained information if causal connection between information and warrant so attenuated as to dissipate taint

6. Warrant Execution Issues

   A. General rules on execution of warrant

   B. Search of individuals on premises during warrant execution

   C. Evidence underlying warrant must not be stale

   D. "No-knock" warrant may be issued if specific evidence of danger presented

   E. Items not particularized in search warrant may be seized if

   F. Dictating contents of documents outside scope of warrant into tape recorder is a seizure

7. Searches Pursuant to Arrest Warrants

   A. Execution of arrest warrants at residences of third parties (when search warrant is/is not required)

B. Absent hot pursuit, consent, or exigent circumstances, warrant required for home entry to effectuate routine felony arrest

C. Def, mistakenly arrested on warrant naming another person, cannot suppress evidence if officer acted in good faith

D. Simple belief that subject of arrest warrant is present in home of third person is not sufficient to justify warrantless search of that home

8. Exceptions to Warrant Requirement

A. General Principles

B. Search Incident to Arrest

C. Consent

D. Plain View and Plain Feel (Touch)

E. Emergency Aid/Hot Pursuit

F. Automobiles (Traffic Stops)

G. Inventory Searches: Automobiles and Arrestees

H. Community Caretaker Function

I. Temporary Detention/Stop and Frisk

J. School Searches

K. Probation/Parole/Extended Supervision (persons on supervision)

L. Law Enforcement Search of Person on Supervision

M. Administrative Inspection

N. Other Exceptions

CR 20: SUPPRESSION—IDENTIFICATION

1. General

A. Def has due-process right not to be subject to unnecessarily suggestive identification procedure

B. Concern is that influence of improper suggestions upon identifying witnesses causes serious miscarriage of justice

C. Societal interests in fair identification procedures include

2. Right to Counsel

A. 6th Amendment right to counsel issues must be treated separately from due-process considerations of suggestiveness

B. Post-indictment lineup is critical stage of proceedings requiring assistance of Atty to avert unfairness at trial and to allow proper confrontation

C. Right to counsel does not apply if

3. Procedure on Suppression Motion

A. Issue of admissibility must be raised by pretrial motion and heard outside presence of jury in pretrial hearing

B. Suppression applies only to intentional police procedures, not to inadvertent procedures

C. Def not automatically entitled to an evidentiary hearing whenever ID admissibility is challenged

D. Lineups and photographic identification

4. One-on-One Show-Ups

A. Def has burden that procedure employed was impermissibly suggestive

B. If Def meets burden, State must show identification was reliable under totality of circumstances

C. Show-up not necessary unless police:

D. May be necessitated by time constraints or emergency

E. Not inherently suggestive and inadmissible when identification is spontaneous or accidental. Ct must serve as gatekeeper and employ § 904.03 analysis

5. Other Identification

A. Bite mark evidence can be admissible on issue of identity

B. Voice exemplars not impermissibly suggestive

6. Jury Instruction

A. When identification is major issue, should give special instruction to jury

CR 21: SUPPRESSION— CONFESSIONS/WITNESS STATEMENTS

1. Suppression Motion Procedure

A. Def may challenge both voluntariness and compliance with 6th Amendment and with Miranda and Jerrell by pretrial motion or objection at trial

B. Hearing

C. Use of statements at trial

2. Voluntariness Standards Generally

A. Background

B. Standards to be applied

3. Involuntary Confessions—Police Tactics

A. Length of time Def in custody and delay before arraignment

B. Allowing Def outside communication

C. Threats to Def

D. Relays of investigators

E. Showing Def victims of crime

F. Psychological coercion inherent in custodial interrogation

G. Giving Miranda warnings to custodial Def

H. Physical abuse

I. Promise of leniency

J. Length of interrogation

K. General conditions under which interrogation took place

L. Prior coerced confessions

M. Police stratagems

N. Confronting Def with evidence against him or her

O. Deceit or misrepresentation

P. Appeals to suspect’s conscience

Q. Referring to and confronting Def with polygraph test results during interrogation

4. Involuntary Confessions—Suspect’s Personal Characteristics

A. Need for water and nourishment

B. Physical and emotional condition

C. Age, education, intelligence, and understanding of Def

D. Previous experience with police

E. Def’s subjective belief in promises made not dispositive

F. Whether Def received Miranda warnings

5. Involuntary Statements of Witnesses, Not Suspects

A. Def may seek to suppress allegedly involuntary statement of witness to police. Involuntariness of witness statement requires:

6. Miranda Rights Generally

A. Warnings necessary to help accused overcome inherent pressures of custodial interrogation atmosphere

B. Two key questions

C. Sufficiency of Miranda Warnings

D. Waiver of Miranda rights

7. Miranda Rights Inapplicable—Suspect Not in Custody

A. Miranda applies after person taken into custody or otherwise deprived of freedom of action in any significant way (of degree associated with formal arrest)

B. Test is objective, reasonable person analysis, from viewpoint of suspect, not subjective test

C. Circumstances suggesting suspect is in custody

D. Circumstances suggesting suspect is not in custody

E. Suspect already incarcerated on another charge is not per se in custody for Miranda purposes; Ct must analyze totality of circumstances described above in Secs. 7.C. & 7.D.

F. Warnings not required before request to take blood alcohol test

G. Warnings not required for PSI, provided investigation not accusatorial in nature

H. Hospital questioning

I. Warnings not required for questioning of student at school by school officials if school liaison officer is merely present

J. Warnings not required for questioning of witness at John Doe proceeding (but John Doe Judge should address witness in accordance with Wis JI-Cr SM-12, which advises witness of right against self-incrimination and right to consult counsel—See CR 48, John Doe Proceedings, Sec. 2.E.)

K. Public safety exception

L. Warnings given during noncustodial interrogation need not be repeated when interrogation becomes custodial

8. Miranda Rights Inapplicable—Suspect Not Being Interrogated

A. Interrogation not limited to express questioning of Def

B. Custodial statements volunteered (not in response to questioning) admissible without warnings

C. No warnings required when Def's voice used only to establish voice levels and characteristics

D. Routine booking questions not interrogation, but only if in actual process of booking

E. Asking suspect whether the suspect is willing to give a statement is not reasonably likely to elicit an incriminating response and therefore does not constitute interrogation

F. Police responding to Def's questions after telling Def they wanted to talk with him about crime while in custody is not interrogation

9. Determining Whether Suspect Effectively Invoked Miranda Rights

A. Def's requests to remain silent or consult with Atty must be scrupulously honored to protect full exercise of 5th and 6th Amendment privileges

B. Right to silence or counsel must be personally requested by Def to be valid

C. If Def requests to remain silent, all questions must cease

D. If Def requests Atty, all questioning must cease

E. Edwards rule invoked by clear and unequivocal request for counsel

F. Edwards rule not invoked by equivocal or ambiguous request

G. Retention of counsel does not automatically bar interrogation; Def may waive right to have Atty present during questioning

H. No need to inform of Atty's efforts to reach suspect when Atty hired by relatives without suspect's knowledge

10. Other Grounds for Suppression

A. Confessions resulting from 6th Amendment violations

B. "Sew-up" confessions

C. Confessions that are fruit of illegal arrest

D. Confessions that are fruit of prior inadmissible statements

E. Confessions that are result of "outrageous government conduct"

F. Compelled confessions

G. Use of physical, nontestimonial evidence derived from a suppressed confession

H. Use of unrecorded statements of Juvs

CR 22: JURY WAIVER

1. Waiver of Jury

A. Must be done in writing or by statement in open Ct, on record, with approval of Ct and consent of State

B. Right to jury trial is personal, fundamental constitutional right

C. Requires personal colloquy with Def; silent acquiescence not sufficient. Ct to

D. Waiver of jury—suggested script

E. Make specific record in accepting waiver of jury trial

F. Remedy for inadequate waiver is new trial

G. Waiver of jury as to element of offense

2. Withdrawal of Waiver of Jury

A. Ct's discretion in allowing Def to withdraw waiver of jury should be liberally exercised

B. Factors to be considered

C. Grant Def's motion to withdraw jury waiver unless showing made that allowing motion will substantially delay or impede cause of justice

3. Trial by Jury of Less Than Twelve

A. May be agreed to any time before verdict

B. Agreement must be in writing or by statement in open Ct, on record, with approval of Ct

C. Requires voluntary, intentional, and intelligent waiver of jury of 12

D. Requires agreement by State

CR 23: SELECTION OF JURY

1. Challenge to the Array

A. Function and purpose

B. Procedure

C. Burden on Def to show

D. Findings

2. Role of Court and Parties

A. Judge has principal role in examination of jurors

B. Voir dire examination must be on the record

C. Def and counsel must be present during voir dire, and these rights may not be waived

D. Either party may supplement Ct's examination

E. Give panel oath before voir dire examination

F. Provision of names and other identifying information about jurors is normally necessary

3. Form and Extent of Questions

A. Scope

B. Prohibited questions

C. Permitted questions

D. Required questions

E. Sensitive questions—procedure

4. Judge's Voir Dire—Suggested Script

A. Jurors, I will ask you certain general questions pertaining to your qualifications to sit as jurors in this case. I will ask counsel to listen carefully to these general questions and not to repeat them. Counsel may ask the jurors generally any proper general questions and in addition may ask proper questions of each juror as to matters peculiar to such juror

B. If your answer to any of my questions is "Yes," please raise your hand

5. Individual Voir Dire

A. When to use

B. Discretionary with Ct

C. Factors for evaluating abuse of Trial Ct discretion in denying individual voir dire

D. To save time, ask as many general voir dire questions as possible of entire panel before starting individual voir dire

E. Individual voir dire still a public proceeding

6. Challenges for Cause

A. Def constitutionally entitled to impartial jury

B. Grounds for excluding prospective jurors

C. Statutory qualifications for prospective jurors

D. Subjective bias

E. Objective bias

F. Rehabilitating a biased juror

G. Ruling on challenge

H. Upon successful challenge for cause

7. Purposeful Discrimination Against Jurors

A. Batson challenge must be raised before jurors are sworn or issue is waived

B. Def denied equal protection when members of distinctive group purposefully excluded

C. Peremptory challenges cannot be exercised by State to remove jurors from distinctive group on assumption that members of that group unable to impartially consider State's case or even in good-faith belief that group would be prejudiced against Def

D. To establish prima facie case of purposeful discrimination Def must show

E. Burden shifts to State to articulate neutral explanation for peremptory challenge

F. Ct must determine under totality of circumstances whether Def carried burden of proving purposeful discrimination

G. Remedy if purposeful discrimination found

8. Peremptory Challenges

A. Retain more than 12 jurors to sufficiently cover total number of peremptory challenges available to all parties

B. Number of challenges

C. Order of exercise of peremptory challenges

D. Waiver of peremptory challenges

E. Mistake in peremptory strike

9. Additional Jurors

A. Procedure

CR 24: JURY MANAGEMENT

1. Swearing in Jury

A. Oath or affirmation must be administered to jurors selected to try case

B. Swearing jury after testimony begins, but before deliberations is harmless error; does not warrant reversal unless Def shows prejudice

2. Jury Sequestration

A. No mandatory sequestration

B. Discretionary sequestration once jury retires to deliberate on verdict

3. Postsentencing Questions About Juror Qualifications

A. Discovery during trial that juror knows or is acquainted with witness or Def

B. False and misleading answers

4. Juror Conduct

A. Ct has important role to scrutinize attentiveness and condition of jurors

B. Any of following requires individualized voir dire initiated by Judge

C. Serious bias or problem may require discharge of juror or mistrial

5. Jury View

A. Addressed to sound discretion of Ct

B. Purpose

C. Procedure

6. Note-Taking by Jurors

A. If authorized by Ct

B. If not authorized by Ct

7. Jurors' Questions

A. Within discretion of Trial Ct to determine whether jurors will be allowed to submit questions for witnesses

B. Most Cts considering question of allowing jurors to submit questions for witnesses have generally confirmed propriety of jury questioning

C. Jurors should submit questions in writing to Ct

8. Jury Deliberations

A. Sequestration

B. Discretionary with Ct which exhibits delivered to jury room

C. Role of bailiff

D. Questions from jury

E. Rereading testimony/replaying recording

9. Hung Jury

A. Standard jury instruction does not have “coercive” impact of “Allen charge”

B. Factors in declaring a jury deadlock

C. Judge may not ask numerical division

10. Discharge of Jurors

A. Alternate juror discharged by lot

B. Juror may be discharged for cause or incapacitation after trial begins

C. Procedure

D. Extreme caution must be used to avoid mistrial by either

E. Options available after discharge of juror

CR 25: PRELIMINARY INSTRUCTIONS/ OPENING STATEMENTS

PRELIMINARY INSTRUCTIONS

1. Procedure

A. Determine whether preliminary instructions to be given (not mandatory)

B. Furnish to parties before giving, so parties may object or propose other instructions

C. Give before opening statements

2. Standard Preliminary Instructions

A. Pattern preliminary instruction—includes

3. Common Preliminary Instructions

A. Statements and remarks of Attys

B. Arguments of Attys

C. Theory of defense

D. Weight of evidence

E. Juror’s knowledge

OPENING STATEMENTS

1. Manner and Purpose

A. Must be on the record

B. Provide framework so jury can better understand and evaluate evidence

C. Allow Attys to outline facts of case expected to be proved and to clarify and narrow issues

2. Scope

A. Scope and extent of opening statement within Ct’s discretion

B. Use of demonstrative evidence within discretion of Ct

C. Def delivers opening statement

3. Interruption of Opening Statements and Curative Instructions

A. Matter of discretion for Ct with or without an objection

CR 26: WITNESSES

1. Oaths
   A. Witnesses required to declare that they will testify truthfully by oath or affirmation
   B. If witness has conscientious scruples against taking oath or against swearing in usual form
   C. May consider combining oath and affirmation, i.e., “Do you solemnly swear or affirm…?”
   D. Purpose of oath not to exclude any competent witness, but rather to add a stimulus to truthfulness whenever possible
   E. Child witness
2. Competency of Witnesses
   A. Every person competent to be witness, unless
   B. For exceptions to general rule, see CR 32, Impeaching Jury Verdict
   C. Competency is issue of credibility to be weighed by trier of fact
3. Compulsory Process/Right to Present a Defense (See also CR 11)
   A. Def has right to state’s assistance in securing the raw materials for an effective defense, to compel attendance of favorable witnesses at trial, and to present evidence that might influence determination of guilt
   B. Right to compulsory process intended to permit Def to request governmental assistance in obtaining exculpatory evidence
   C. Def must show reasonable probability that testimony of witness to be subpoenaed will lead to evidence that is
   D. Def has constitutional right to discover existence of potential witnesses
   E. Right to present a defense
   F. Def has right to seek suppression of certain evidence
   G. Prosecutor may introduce statement or confession of Def
4. Exclusion of Witnesses from Hearing or Trial
   A. Matter of right upon request
   B. Ct may order exclusion on own motion
   C. Persons exempt from exclusion
   D. Sanction upon violation of order for exclusion
   E. Witnesses may be separated or sequestered during hearing or trial
5. Compelling Testimony—No 5th Amendment Privilege
   A. Sanctions upon failure to respond to subpoena
   B. Bail for witness may be required
   C. Refusal to answer nonincriminatory question
6. Compelling Testimony—5th Amendment Privilege
   A. General
   B. Procedure for compelling testimony—DA gives immunity
   C. Refusal to answer following grant of immunity
   D. Asserting 5th Amendment privilege—no immunity
7. Plea Bargains and Testimony
   A. State may properly offer immunity, lenient treatment, prosecutorial abstinence, or favor to person charged with crime, conditioned on person’s full and truthful testimony
   B. To be admissible, established safeguards must be followed
8. Confrontation

A. Ultimate goal of Confrontation Clause is to ensure reliability of evidence against criminal Def by testing in crucible of cross-examination

B. Criminal Def has same right to confront witnesses under Federal and State Constitutions

C. Analysis

D. Co-defendant's confession

E. Forensic reports

F. Depositions

9. Child's and Child-Victim's Statements

A. Audiovisual recordings of statements of children (not audiovisually recorded depositions)

B. Admissibility of child-victim's statements under excited utterance exception

C. Admissibility of child-victim's statements under residual hearsay exception

D. Admissibility of statements under medical diagnosis or treatment exception

10. Use of Former Testimony

A. Two tests must be met to allow use of witness's former testimony

11. Out-of-Court Translators

A. If no indication of inaccuracy, translator is considered a conduit for communication—translator's statements are those of the speakers—and thus translator need not be a witness

B. Ct should conduct hearing out of presence of jury to determine whether opponent can show

12. Privileges

A. For privilege to apply, communication must be confidential

B. Selected privileges (see Ch 905)

C. Statements made by Def at John Doe proceeding are absolutely privileged under § 942.01(3), even if perjurious

D. Cannot create testimonial privileges by judicial decision

E. Potential witness's right against self-incrimination defeats Def's right to compulsory process

F. Privilege is waived if the holder voluntarily discloses or consents to disclosure of the confidential matter or communication or any significant part thereof

13. Rape Shield Statute: § 972.11

A. Prior sexual conduct

B. Exceptions—Statutory

C. Exceptions—Constitutional

D. Other exceptions

E. Manner of dress

F. Pretrial determination of applicability of § 971.31(11) exception and admissibility required

14. Attorney as Witness

A. Attys are competent to testify

B. Trial Ct has discretion to allow advocate to testify in client's case

15. Defendant Perjury

A. Counsel's role

B. Ct's role

16. Rebuttal Witness

A. No duty to disclose

B. Evidence ruled inadmissible in case-in-chief may be admissible for rebuttal

CR 27: EXPERT WITNESSES

1. Expert Witnesses

A. Witness qualified by

B. Permitted if

C. Beginning with actions or special proceedings commenced on or after February 1, 2011, Wisconsin uses “reliability (Daubert) test”; pre-February 1, 2011, Wisconsin uses “relevancy test”

D. Basis of opinion

E. Soundness of opinion

F. Underlying data

G. Use of reports at trial

H. Cross-examination of expert at trial

I. Payment of expert/investigator fees—Def eligible for SPD

J. Payment of expert/investigator fees—Def indigent but not eligible for SPD

2. Opinion Concerning Witness’s Credibility or State of Mind

A. No witness, expert or otherwise, should be permitted to give opinion that another mentally and physically competent witness is telling the truth

B. Exceptions

C. Expert testimony regarding post-assault conduct of sexual assault or battery victim does not contravene rule in Sec. 2.A., above, as long as witness does not comment on complainant’s credibility

3. Expert Testimony on Capacity to Form Intent

A. Opinion evidence on Def’s capacity to form a criminal intent, based in whole or part on mental health history properly excluded

B. But non-opinion testimony as to Def’s mental health history admissible, if otherwise relevant

4. Expert Testimony on Intoxication

A. Properly qualified expert on effects of intoxication may testify about effect of intoxication on ability to form intent

B. Drug recognition expert is subject to Daubert analysis

C. Apply § 907.02 as to qualification of expert and purpose of testimony

D. Expert testimony on intoxication—Expert may rely in part on PBT results in OWI cases

5. Expert Testimony on Post-assault Conduct

A. In discretion of Ct, expert qualified by training or experience may testify on behavior exhibited by sexual assault victims

B. Expert witness may be asked to describe behavior of complainant and then to describe behavior of victims of same type of crime, if testimony helps jury understand complainant’s reactive behavior

6. Expert Testimony on Character

A. Def may call expert regarding pertinent character trait

7. Procedure If Challenge Raised

A. Hearing on motion in limine

CR 28: HYPNOSIS/POLYGRAPH/DNA

HYPNOSIS

1. Per Se Ban Unwarranted in Criminal Trials

A. Before trial, Ct must determine admissibility of testimony “refreshed” by hypnotic session

B. Any party may use hypnosis to refresh witness recollection, provided

C. Def’s rights to confrontation and due process not denied, provided

2. Procedure for Determining Admissibility

A. Notice

B. Suppression hearing

C. Guidelines for determination of suggestiveness

D. Extent of compliance with guidelines not determinative of admissibility issue

E. Ct to determine reliability of statements under totality of circumstances

3. Procedure When Testimony Found Admissible

A. If admissible for State

B. If admissible for defense, same criteria as above, but roles reversed

POLYGRAPH

1. Discovery of Polygraph Results

A. Privileges of subject of polygraph examination

B. Information protected against discovery

C. Privileges may be claimed by

2. Polygraph Results Not Admissible in Any Criminal Proceeding

A. Testimony that inferentially puts the results of a polygraph before jury is inadmissible

B. Exception: Admissible only if Stanislawski stipulation executed on or before September 1, 1981

C. Stanislawski stipulation requirements

D. Admissibility hearing considerations

E. Examiner may be cross-examined at trial

F. Cautionary jury instruction required when results of test admitted

3. Postpolygraph Statements

A. Case-in-chief

B. Statement used to impeach Def

4. Offer to Take Polygraph Examination

A. Offer admissible

B. Withdrawn offer admissible

DNA

1. Definition

A. “Deoxyribonucleic acid profile” means an individual’s patterned chemical structure of genetic information identified by analyzing biological material that contains the individual’s deoxyribonucleic acid

2. Introduction of DNA Evidence at Trial

A. Proponent’s action

B. If other party makes request, they must receive, within 15 days after request

C. Ct may grant a continuance to provide exchange of information

D. State must establish chain of custody

3. Offer to Undergo DNA Testing

A. May reflect "consciousness of innocence"

4. DNA Sampling

A. At arrest. See CR 7, Sec. 3

B. Upon conviction. See CR 37, Sec. 1.R.

Wisconsin Judicial Benchbooks

Volume I
Criminal and Traffic

Seventh Edition

The Wisconsin Judicial Benchbooks are not intended
to be cited as independent legal authority
2024

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IN MEMORIAM

RONNI G. JONES

April 12, 1941—November 7, 2002

The Wisconsin Judicial Benchbooks have borne the imprint of their Project Editor, Ronni Jones, since 1988 when Ronni first assumed this task for the Office of Judicial Education. In that time, the judges and lawyers of this state have benefited from her focused dedication to the creation and maintenance of a useful, practical resource for Wisconsin's trial judges. And those of us who had the good fortune to know and to work with Ronni have benefited from the friendship and collegiality of this vibrant, witty, and generous woman.

Ronni brought to her work a fierce intelligence and a logical and discerning approach to solving problems. Along with it came a marvelous sense of humor and a dry wit served up with a trace of a Brooklyn accent. Ronni was the genuine article. It was fun to see her discuss a case or a legal issue with a group. She was energized by the intellectual discussion, but always with a purpose; she unfailingly kept her eye on the practical goal of how the end product could be used to assist judges.

Ronni's commitment to judicial education is perhaps not surprising. When she entered law school at the age of 42, she had already combined raising a family with a history of work in training and education, and a track record of commitment to volunteerism and public service. She was married for 40 years to P. Charles Jones, a bright and

thoughtful Dane County judge who was himself a longtime member of the Civil Benchbook Committee. And she loved a challenge.

Warmth and humor infused Ronni's relationships with the people she knew and worked with. She was gracious and unpretentious, encouraging and delighting in conversation whether around the conference table or the dinner table. She was a facilitator in the best sense of the word; she wanted to include everyone in the discussion or in the gathering or in the party.

Ronni loved her work but more so the abiding friendships developed in the course of her work. We remember her with gratitude as a judicial educator who helped to make us better judges. And we remember her with fondness as a friend who, along the way, helped to make us better people.

The Wisconsin Judicial Benchbook Editorial Committees
April 15, 2003

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For online access to a master index of topics discussed in the Wisconsin Judicial Benchbooks, please go to https://booksunbound.wisbar.org/w/wisbar/AE0025-MASTER.INDEX.

PREFACE

For 40 years now, the Wisconsin Office of Judicial Education and the hard-working members of the five Benchbook Committees have provided Wisconsin's judges with a practical, everyday working tool for judging cases fairly, correctly, and efficiently. The Benchbooks are a comprehensive guide, a distillation of the law as well as the experience, practice, and thought of many outstanding Wisconsin judges and attorneys. The Benchbooks have proved particularly valuable to new judges and to experienced judges who are periodically rotated to new assignments.

The original Benchbooks, first published in 1982, numbered only three. There have been many improvements since:

- In the 1980s, we took the growing family law materials out of their original volume, where they had been joined with the probate, mental health, and juvenile materials, and published them as a separate volume. In 1994, juvenile materials and probate and mental health materials were given their own separate volumes.

- Since the fall of 1983, the State Bar of Wisconsin has made the Benchbooks available to the legal community at large. The Judicial Education Office is grateful for the enthusiastic technical publication assistance provided over the years by the State Bar directors and their staff.

- The Benchbooks have become a collective work of a much broader group of experts. In the beginning, the Benchbook volumes were primarily the product of a relatively small group including the Director of Judicial Education, the Benchbook Project Manager, members of a single advisory committee, individual judge and attorney contributors and reviewers, and a series of part-time attorneys working with the Judicial Education Office as researchers and editors. A tremendous amount of the work was performed by the "Judicial Editor," Judge Angela B. Bartell. Since 1992, however, the work has been spread among five committees (one responsible for each volume), whose members write and edit most of the rough drafts and all final substantive drafts of updates, revisions, and expansions. And since 1993, they have been assisted by a permanent researcher/editor who fills a half-time position in the Judicial Education Office. Program Attorney Ronni Jones (to whom all of these volumes are dedicated—see the memorial at the front of this volume) was the first. Between 2001 and 2015, the committees were served by Attorney Karla Baumgartner, until she assumed the position of Director of the Office of Judicial Education. In 2016, Attorney Hana Miura became the latest editor to join this project.

- Starting in 1994, we have issued a published update of each Benchbook volume virtually every year.

- The Benchbook committees continue to take advantage of periodically scheduled revisions as opportunities to revamp each volume, streamlining them and making them more user-friendly.

- The Benchbooks are now available to judges online, for even more immediate and convenient reference.

Each of the Benchbook Committee Chairs serves a term of five years. Committee members serve two- or three-year terms, and may serve more than one term. The original benchbook committees were as follows:

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Special gratitude is owed to these individuals and groups:

- Reserve Judge Angela B. Bartell, who served as Judicial Editor for an entire decade, and who, as a result of countless hours of writing and editing and unwavering dedication, devotion, and guidance, nurtured the Benchbooks and established them as the resource judges and lawyers rely on so heavily.

- The members of the Wisconsin Supreme Court, its Judicial Education Committee, and the Director of State Courts. Their constant support makes possible not only the Benchbooks, but all of the many educational programs offered by the Judicial Education Office for the Wisconsin judiciary.

- David H. Hass, who served as Director of the Office of Judicial Education from 1997 to 2013. His professionalism, dedication, and quiet competence provided a solid foundation for ensuring that Wisconsin remained a leader in judicial education.

March 2022

Office of Judicial Education, Wisconsin Court System

Pre-1994 ACKNOWLEDGMENTS

We wish to thank the following people who contributed to the Wisconsin Judicial Benchbooks and supplements. Their generous contributions and assistance make these benchbooks reflect Wisconsin's best judicial practices and techniques. To each of them the Supreme Court Office of Judicial Education expresses its profound gratitude.

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USER'S GUIDE AND ABBREVIATIONS

The Wisconsin Judicial Benchbooks are unique legal publications, designed as highly functional practice aids. Standard rules of sentence and punctuation have been modified to accommodate the terse outline style used throughout. Easy access to the text can be achieved in three ways: (1) through the comprehensive Table of Contents at the beginning of each volume, (2) through the Major and Minor Subject Tab System, and (3) through the Table of Contents at the beginning of each Minor Subject Tab.

Citations have been placed in the left margin, corresponding to the block of text for which they are authority. While every effort has been made to ensure that the citations of authority are accurate and the suggested procedures are appropriate, the Benchbooks (as any practice aid) must be used with caution. **THE USER IS ADVISED TO CONSTANTLY TEST THE BENCHBOOK'S CITATIONS AND SUGGESTED PROCEDURES AGAINST THE USER'S CONTINUING ORIGINAL RESEARCH, EXPERIENCE, AND COMMON SENSE**.

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Citation Abbreviations

A2d	Atlantic Reporter, 2nd series
ABA Stds	American Bar Association Standards
ALR	American Law Reports
ALR2d	American Law Reports, 2nd series
ALR3d	American Law Reports, 3rd series
ALR4th	American Law Reports, 4th series

Am Jur	American Jurisprudence
Am Jur 2d	American Jurisprudence, 2nd series
CJ	Corpus Juris
CJS	Corpus Juris Secundum
Const	Constitution
Cr L	Criminal Law Reporter
F	Federal Reporter
F2d	Federal Reporter, 2nd series
FRCP	Federal Rules of Civil Procedure
FRCrP	Federal Rules of Criminal Procedure
FS	Federal Supplement
IRC	Internal Revenue Code
LEd2d	Lawyers Edition, 2nd series
OAG	Attorney General Opinion
P2d	Pacific Reporter, 2nd series
Pin	Pinney's Wisconsin Reports
RMC	Records Management Committee
SCR	Wisconsin Supreme Court Rules
S. Ct.	U.S. Supreme Court Reporter
St	State
SW2d	South Western Reporter, 2nd series
USC	United States Code
USCA	United States Code Annotated
Wis Adm Code	Wisconsin Administrative Code
Wis JI-Cr	Wisconsin Jury Instructions, Criminal
Wis JI-Cv	Wisconsin Jury Instructions, Civil
Wis JI-Cr, SM	Wisconsin Jury Instructions, Criminal, Special Materials

Note: At times, the user will encounter citations that include abbreviations other than those listed above. The Benchbook format restricts printing the full, unabbreviated names. We regret any inconvenience this may cause, but we are confident that in most instances, the abbreviations are self-evident.

Text Abbreviations

AG	Attorney General
AOD	Alcohol and Other Drugs
AODA	Alcohol and Other Drugs Abuse
Asst	Assistant
Atty	Attorney
AV	Audiovisual
Bd	Board
CCAP	Consolidated Court Automation Programs (wcca.wicourts.gov)
CDL	Commercial Driver's License
Ch	Chapter
CHIPS	Child in Need of Protection or Services
CIP	Challenge Incarceration Program
CMV	Commercial Motor Vehicle
Co	Company
Comm'r	Commissioner
Corp	Corporation
CSA	Child Support Agency
Ct	Court
Cty	County
DA	District Attorney
Def	Defendant
Dept	Department
DHS	Department of Health Services
DL	Driver's License

DOA	Department of Administration
DOC	Department of Corrections
DOT	Department of Transportation
DWD	Department of Workforce Development (formerly DILHR)
ERP	Earned Release Program
ERRC	Earned Release Review Commission
ES	Extended Supervision
FCC	Family Court Commissioner
GAL	Guardian ad Litem
Gdnshp	Guardianship
ICJ	Interstate Compact on Juveniles
ICPC	Interstate Compact on the Placement of Children
ICWA	Indian Child Welfare Act
IID	Ignition Interlock Device
Ins	Insurance
Juv	Juvenile
PAT	Positive Adjustment Time
PBT	Preliminary Breath Test
Prelim	Preliminary Hearing, Preliminary Examination
PSI	Presentence Investigation, Presentence Report
PD, SPD	State Public Defender
RCCCY	Residential Care Center for Children and Youth
RCS	Operating with a Restricted Controlled Substance
SAP	Substance Abuse Program
Std	Standard
TPR	Termination of Parental Rights
UCCJEA	Uniform Child Custody Jurisdiction and Enforcement Act
US	United States
Wis	Wisconsin

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Volume I | Volume IA

CR 1: VICTIMS' RIGHTS

§ 950.02

1. Selected Definitions

§ 950.02(1)

A. "Child" is person who is less than 18 years of age, except as provided in § 950.02(3)

§ 950.02(3)

B. "Family member" is spouse, minor child, adult child, sibling, parent, or legal guardian

Wis Const art I,
§ 9m(1)(a)
§ 950.02(4)(a)

C. "Victim" is any of the following

1) Person against whom crime committed, or

2) Parent, guardian, legal custodian if person in 1) is a child, or

3) If person in 1) is deceased

   a. Family member of deceased

   b. Person who resided with deceased

Wis Const art I,
§ 9m(1)(a)

D. "Victim" does not include the following

1) Accused, or

2) Person the Ct finds would not act in the best interest of a victim who is deceased, incompetent, a minor, or physically or emotionally unable to exercise rights

§ 905.045(1)(e)

E. "Victim advocate" means an individual who is an employee of or volunteer for an organization the purpose of which is to provide counseling, assistance, or support services free of charge to a victim

Wis Const art I,
§ 9m(2)(a)–(p)

2. Constitutional Rights

A. Crime victims have the following rights during the criminal and juvenile justice process

1) Be treated with dignity, respect, courtesy, sensitivity, and fairness

2) Privacy

St v Johnson
2023 WI 39
407 Wis. 2d 195

a. Privately held medical records are privileged from disclosure

3) Proceedings free from unreasonable delay

4) Timely disposition of the case, free from unreasonable delay

5) Upon request, to attend all proceedings involving the case

6) Reasonable protection from the accused

7) Upon request, to reasonable and timely notification of proceedings

8) Upon request, to confer with the Atty for the government

St v Johnson
2023 WI 39
407 Wis. 2d 195

9) Upon request, to be heard at any proceeding that implicates a victim's right

10) Have information about the economic, physical, and psychological effect upon the victim submitted to the Ct and considered

11) Upon request, to timely notice of any release, escape, or death of the accused

12) Refuse an interview, deposition, or other discovery request made by the accused

13) Full restitution and assistance collecting restitution

St v M.L.J.N.L.
(In Int of M.L.J.N.L.)
No 2021AP1437
(Wis. Ct. App. 2/28/2024)
(publication
recommended)
See also §§ 938.34(5)(a)
973.20

a. Restitution request still subject to statutory hearing procedures and criteria

14) Compensation

15) Upon request, reasonable and timely information about the investigation and outcome of the case

16) Timely notice of all rights and how they can be enforced

Wis Const art I, § 9m(6)

B. Victims are not afforded party status to a case

Wis Const art I, § 9m(2)
& (6)
St v Johnson
2023 WI 39, ¶ 44
407 Wis. 2d 195

C. Victims' rights shall be protected in a manner no less vigorous than the Def's, but may not supersede a Def's federal constitutional rights

3. Consultation Requirements

A. Ct to inquire whether DA has complied with consultation requirements of victims' rights law

§ 971.08(1)(d)
§ 971.095(2)
§ 950.04(1v)(j)

1) Before accepting plea of guilty or no contest

§ 971.315
§ 971.095(2)
§ 950.04(1v)(j)

2) Before dismissing case

§ 972.14(2m), (3)
§ 950.04(1v)(L), (m)

3) Before pronouncing sentence

4. Court Action

§ 971.10(3)(b)3.
§ 950.04(1v)(ar)

A. Ct must consider interest of victims before granting continuance

Wis Const art I,
§ 9m(2)(i)
§ 972.14(3)(a)
§ 950.04(1v)(m)

B. If requested by victim, Ct must allow victim to make a statement at sentencing

Wis Const art I,
§ 9m(2)(i)
§ 950.04(1v)(b)

C. Ct must allow victim to attend all proceedings involving the case

§ 950.04(1v)(b)
§ 906.15(2)(d)

Except Ct may sequester testifying victim if necessary to provide a fair trial

Mere presence of victim during testimony of other witnesses may not form sole basis to sequester victim

Wis Const art I,
§ 9m(2)(m)
§ 973.20(1r)
§ 950.04(1v)(q)
St v Gribble
2001 WI App 227
248 Wis. 2d 409

D. Ct shall order restitution to victim

§ 895.45(2)
§ 950.04(1v)(c)

E. Ct must allow service representative to accompany victim of abusive conduct, other than when victim is testifying or is represented by counsel, and may allow service representative to address Ct on behalf of victim

§ 950.045

F. Victim advocate may accompany victim of sexual assault, child sexual assault, human trafficking, and related offenses at law enforcement interviews, prosecution interviews, department of corrections proceedings, Ct proceedings, and postconviction proceedings

§ 950.04(1v)(e)
§ 967.10(2)

G. Cty must provide separate waiting room for victims or, if not practical, other means to minimize contact with Def

5.

Standing

Wis Const art I,
§ 9m(2)(i)
§ 950.105

A. Crime victim has standing to assert rights in any Ct in Cty in which alleged violation occurred or may ask DA to act

Wis Const art I,
§ 9m(4)(a)
RMC Form CR-296
RMC Form CR-297

B. Crime victim or Atty may assert and seek in any Ct enforcement of any right and the Ct shall act promptly and afford a remedy

NOTE: The order in RMC Form CR-297 requires the Ct to specify the date on which it held a hearing on the request for enforcement of the victim's rights.

Wis Const art I,
§ 9m(4)(b)

C. Crime victim may obtain review of adverse decisions by filing petition for supervisory writ with appellate Cts

CR 2: INTERPRETERS

1. When Should an Interpreter Be Appointed?

§ 885.38(3)(a)

A. In all proceedings, if Ct determines that person has limited English proficiency and that interpreter is necessary

§ 885.38(1)(b)

1) "Limited English proficiency" means:

a. Inability to adequately understand or communicate effectively in English in a Ct proceeding, because of person's use of foreign language

See generally Americans with Disabilities Act (ADA), 42 USC §§ 12101–12213

b. Inability, because of disability, to adequately hear, understand, or communicate effectively in English in a Ct proceeding

St v Yang
201 Wis. 2d 725, 733–34 (Ct. App. 1996)

2) When Ct is put on notice of potential need for interpreter because of Def's difficulty with English, Ct must determine whether difficulty may impair person's ability to:

a. Communicate with counsel

b. Understand testimony in English

c. Make self be understood in English

Strook v Kedinger
2009 WI App 31
316 Wis. 2d 548

3) Ct should make determination before any substantive hearing

4) Such determination does not require elaborate hearing and may be capable of being made upon asking a few questions

Title VI Civil Rights Act, 42 USC § 2000d; Exec Order No 13166, 65 FR 50121 (Aug 11, 2000)

B. If Ct is recipient of any type of federal funding through any source, it must comply with Title VI of the Civil Rights Act, which prohibits discrimination on the basis of national origin

1) Ct must ensure meaningful access is provided to persons with limited English proficiency

See 67 Fed Reg 41455
(June 18, 2002)

2) Ct must determine importance of service, including consequences of not providing interpreter or providing inadequate interpreter

C. Waiver of interpreter

§ 885.38(3)(a)

1) Ct must advise person of right to qualified interpreter

§ 885.38(4)(a)

2) Ct may accept waiver of right to a qualified interpreter at any point if Ct advises the person of the nature and effect and determines that waiver made knowingly, intelligently, and voluntarily

§ 885.38(4)(b)

3) Person may retract waiver for good cause at any point

St v Neave
117 Wis. 2d 359 (1984)

4) Right to interpreter is personal right and cannot be waived by Def's Atty

2. Suggested Voir Dire to Establish Need for an Interpreter

Recommendation

See Working with Interpreters in Wisconsin Courts—Benchcard for Judges, https://www.wicourts.gov/services/judge/docs/interpreterbenchcard.pdf. Judges can also access this benchcard at the end of the *Criminal Benchbook* on the Judicial Dashboard

A. Elaborate hearing unnecessary

1) Ask open-ended questions that call for complete sentences as an answer

2) When in doubt about person's ability to comprehend proceedings or to express himself/herself in English, appoint interpreter

B. Suggested questions:

1) How did you come to Ct today?

2) Describe your education for me

3) Please tell me about your home country

4) What is the purpose of your Ct hearing today?

5) Please describe what you see in this courtroom

6) How did you learn English, and what is most difficult about communicating in English?

3. Who Is a Qualified Interpreter?

§ 885.38(1)(c)

A. A "qualified interpreter" is able to:

1) Readily communicate with the person

2) Orally transfer meaning to and from English in the context of a Ct proceeding

3) Readily and accurately interpret, without omission or additions, conserving meaning, tone, and style of original statement

§ 906.04
§ 885.38(5)

B. Interpreter must be qualified and sworn as an expert. ***See infra*** **Sec. 4**

§ 885.38(6)

C. Any party may object to use of a particular interpreter and Ct may remove for good cause (*See infra* Sec. 9—Suggested Voir Dire of Interpreter Qualifications)

§ 885.38(7)

D. Delay resulting from the need to find a qualified interpreter may constitute good cause to toll time limitations

885.38(2)

E. Supreme Ct must establish policies for recruitment, training, certification, and discipline of Ct interpreters. A list of certified interpreters is available online at https://www.wicourts.gov/services/interpreter/search.htm

4. Interpreter Oaths

§ 885.38(5)
§ 906.04

A. Interpreters at trial must take oath that they will correctly interpret all proceedings

1) "Do you solemnly swear or affirm that you will interpret truly, accurately, completely, and impartially?"

B. Sign language interpreters who accompany jurors into the jury room need an additional oath

1) "Do you solemnly swear or affirm: that you will not participate personally in the jury's deliberations, nor make any comment about your personal recollections of the evidence or your opinions about the outcome of this case; and that you will not disclose or comment upon anything that you hear in jury deliberations unless ordered to do so by the Ct?"

5. Cost of Interpreters

§ 885.38(3)(a)
OAG 9A-08 (10/24/08)

A. Interpreters provided at public expense:

Americans with
Disabilities Act (ADA);
ADA Amendments Act
of 2008

1) When interpreter needed because of a disability

§ 885.38(3)(a)

2) When person needing interpreter services is

a. Party

b. Testifying witness

c. Alleged victim, as defined in § 950.02(4)

d. Parent or legal guardian of minor party or legal guardian of party

e. Another person affected by the action, as deemed necessary and appropriate by Ct

Prakel v. Indiana
100 F. Supp. 3d 661
(SD Ind 2015)

f. Spectator, if interpreter needed because of disability

§ 885.38(8)(a)

B. Who pays

1) Cty pays expenses for in-Ct proceedings before Circuit Ct

2) Director of State Cts reimburses counties for interpreter services as provided in §§ 885.38 and 758.19

§ 885.38(3)(e)

C. Out-of-Ct services

1) Ct may approve if related to Ct proceedings, such as Ct-ordered psychiatric or medical exams or mediation

St v Le
184 Wis. 2d 860 (1994)
cf. 885.38(1)(a)

2) Out-of-Ct services for State and Cty agencies, such as PSIs and witness interviews, are budgetary responsibility of agency on behalf of which services were rendered

§ 885.38(8)(b)
St v Le
184 Wis. 2d 860 (1994)

3) SPD pays expenses for interpreters in preparing for Ct proceedings

6. Use of Interpreters

A. Before going on the record, be sure the interpreter and witness/party are able to communicate

§ 967.09
§ 807.14

B. By telephone or audiovisual means

1) Interpreter may act via telephone or videoconference at proceedings other than trial

Recommendation

2) Telephone interpreter services can be cost-effective and efficient for rare languages, short nonevidentiary proceedings, emergency matters

3) Qualified in-person interpreters preferred for longer proceedings

4) Ct must still inquire into interpreter's qualifications

§ 885.38(3)(b);
A Handbook for Court Interpreters Working in Teams (Nov. 30, 2015), https://www.wicourts.gov/services/interpreter/docs/inthandbook.pdf

C. Multiple interpreters: Ct may appoint more than one qualified interpreter when necessary

1) Recommended when Def and witness both need interpreters

2) Recommended for trials and proceedings over 2 hours

3) Recommended for multiple Defs when needed for attorney-client consultation

St v Santiago
206 Wis. 2d 3, 24 (1996)

4) Need for counsel and Def to communicate while witness is testifying

D. Interpreter for juror

§ 885.38(3)(c)

1) If a deaf or hard-of-hearing person is part of a jury panel, the Ct shall appoint an interpreter for that person

2) Sign language interpreters who accompany jurors into the jury room need an additional oath

a. "Do you solemnly swear or affirm: that you will not participate personally in the jury's deliberations, nor make any comment about your personal recollections of the evidence or your opinions about the outcome of this case; and that you will not disclose or comment upon anything that you hear in jury deliberations unless ordered to do so by the Ct?"

E. Instruction to Jury

Recommendation

1) Ct should clarify role of interpreter

a. "We will have an interpreter assist us through these proceedings. The interpreter is here only to interpret the proceedings and to enable us to communicate with each other. The interpreter is not a party in this case, has no interest in this case, does not take sides, and is not allowed to give legal advice or any other assistance"

F. Privilege and hearsay

§ 905.015

1) For privileged communications, interpreter may claim privilege on behalf of a person receiving the interpretation who holds the privilege, and interpreter's authority is presumed in the absence of evidence to the contrary

St v Patino
177 Wis. 2d 348
(Ct. App. 1993)

2) Interpreter's words are presumed to be the speech of the Def or witness for purposes of hearsay

St v Russ
2006 WI App 9
289 Wis. 2d 65

G. Caution: Shackling disruptive deaf Def may hamper ability to communicate

7. Introducing Recorded Evidence in English or Non-English Language

WI Court Interpreter Program, *Guidelines for Recorded Evidence in a Non-English Language* (2/20/23), https://www.wicourts.gov/services/interpreter/docs/guiderecevidence.pdf

A. Typically this involves documents, voice recordings, or videos in non-English to be translated into English; OR similar items in English to be translated into a non-English language. Examples include 911 call recordings, police interview recordings, and surveillance recordings

Ct should refrain from asking the interpreter to render an instantaneous interpretation of non-English audio and video recorded evidence

§ 901.09(1)

B. Ct may require a lengthy writing in non-English to be accompanied by a written translation into English with attached affidavit by the translator stating qualifications to perform translation and certifying it is true and correct

§ 901.09 cmt

1) This requirement is not intended to apply only to written documents. Should also apply to recordings

WI Court Interpreter Program, *Guidelines for Recorded Evidence* (2/20/23)

2) Ct should inform parties before trial or hearing that a transcription and translation of any non-English recorded evidence is expected to be filed before the hearing or trial

§ 901.09(2), (3)

3) Party may object to all or parts of a translation or to the qualifications of the translator. Ct may require objecting party to submit an alternative transcription and translation

WI Court Interpreter Program, *Guidelines for Recorded Evidence* (2/20/23)

C. If Ct asks interpreter to interpret recorded evidence in English, best practice is for Ct to allow interpreter to become familiar with the recorded evidence and provide a transcript

8. Court Interpreter Code of Ethics

SCR 63.003

A. Applies to:

1) Foreign language interpreters

2) Sign language interpreters

3) Real-time Ct reporters when providing access for deaf or hard-of-hearing Ct users

SCR 63.01

B. Interpretation must be complete and accurate

1) Must not alter, omit, or add to meaning of what is said or written

2) Must not explain purpose of hearings or forms

SCR 63.01 cmt

3) Will need to prepare for Ct by reviewing file, documents

SCR 63.02

C. Interpreter must accurately disclose qualifications and experience

SCR 63.03

D. Interpreter must be impartial and unbiased

1) Real or perceived appearance of conflict of interest must be reported to Ct

SCR 63.04

E. Interpreter must maintain a professional demeanor

F. Confidentiality and restriction on public comment

SCR 63.05

1) Interpreter must protect all privileged and confidential information

2) Interpreter may review confidential parts of record if relevant to the hearing to be interpreted

SCR 63.06

3) Interpreter must not publicly discuss or offer opinion on any matter, even when matter is not privileged or confidential

SCR 63.07

G. Interpreter shall not:

1) Give legal or other advice

2) Express personal opinions to persons using their services

3) Engage in other services or activities while serving as interpreter

H. Interpreters must:

SCR 63.08

1) Report to Ct any reservations about ability to perform as interpreter

SCR 63.09

2) Report to Ct any ethical violation or efforts to impede interpreter's compliance with laws, code, or Ct policies

SCR 63.10

3) Improve skills through professional education and training

9. Suggested Voir Dire of Interpreter Qualifications

Recommendation.

A. Suggested questions to establish an interpreter's qualifications:

1) [***Spoken Language***:] Are you certified as a Ct interpreter by this state or any other state or federal Ct? [***Sign Language***:] Do you hold legal certification from the Registry of Interpreters for the Deaf (RID) or other approved entity? Do you hold an interpreter license from the State of Wisconsin's Department of Safety and Professional Services?

2) Please describe your formal schooling. Do you have any formal training in interpreting? In legal or Ct interpreting?

3) Please describe your experience as an interpreter. Have you ever interpreted in Ct before? What kind of proceedings?

4) Have you spoken with the person who needs interpreting, or do you need a few minutes now to talk? Are there any communication problems?

5) Do you know any of the parties, witnesses, or attorneys? Are you aware of any conflict of interest that you might have in this case?

6) Are you able to interpret simultaneously and consecutively? Do you understand that you must interpret everything said on the record?

7) Have you read the Code of Ethics for Ct Interpreters in the Wisconsin Cts? Do you understand it and agree to abide by it?

10. Jury Instructions

Wis JI-Cr 60

A. Preliminary instruction: use of an interpreter for a witness

Wis JI-Cr 61

B. Preliminary instruction: use of an interpreter for a juror

Wis JI-Cr 62

C. Preliminary instruction: use of an interpreter for the Def

CR 3: COUNSEL

US Const amend VI
Wis Const art I, § 7
Douglas v California
83 S. Ct. 814 (1963)
Powell v Alabama
53 S. Ct. 55 (1932)

1. Right to Counsel

St v Pultz
206 Wis. 2d 112 (1996)

St ex rel Winnie v Harris
75 Wis. 2d 547 (1977)

A. Def has right to Atty at any proceeding in which there is possibility of incarceration

Michigan v Harvey
110 S. Ct. 1176 (1990)
St v Jones
192 Wis. 2d 78 (1995)

1) Essence is opportunity for Def to consult with Atty and have Atty investigate case and prepare defense for trial or for hearing

US v Gonzalez-Lopez
126 S. Ct. 2557 (2006)

2) Def has right to counsel when counsel not appointed

a. Erroneous denial of counsel of choice will result in reversal

St v Mazur
90 Wis. 2d 293 (1979)
Wis JI-Cr SM-30

B. Right to counsel extends to all "critical" stages

1) During questioning by police

St v Reitter
227 Wis. 2d 213 (1999)
St v Neitzel
95 Wis. 2d 191 (1980)

a. Decision whether to take a chemical test for intoxication not a critical stage

2) At police lineups

3) At time of initial appearance

St v Wolverton
193 Wis. 2d 234 (1995)
St v Lee
2021 WI App 12
396 Wis. 2d 136

4) At prelim

5) At evidentiary hearings

6) At arraignment

7) At trial

St v Behnke
155 Wis. 2d 796 (1990)

8) At time of return of verdict

9) At sentencing

St v Perez
170 Wis. 2d 130
(Ct. App. 1992)

a. Does not include right to counsel at presentence interview

St v Mosley
102 Wis. 2d 636 (1981)

10) Appeals

Pennsylvania v Finley
107 S. Ct. 1990 (1987)

a. Right to appointed counsel applies to direct appeal, not to collateral attack under § 974.06

St ex rel Warren
v Schwartz
219 Wis. 2d 615 (1998)

- Not violation of due process to refuse to appoint counsel on § 974.06 collateral attack on revocation of probation

St ex rel Schmelzer
v Murphy
201 Wis. 2d 246 (1996)

11) Petition for review by Supreme Ct

St v Coerper
199 Wis. 2d 216 (1996)
St v Lass
194 Wis. 2d 591
(Ct. App. 1995)

C. Right to counsel is offense-specific

Scott v Illinois
99 S. Ct. 1158 (1979)
Argersinger v Hamlin
92 S. Ct. 2006 (1972)

D. Indigent Def has right to counsel appointed at public expense

Vigil v St
76 Wis. 2d 133 (1977)

1) No right to demand representation by specific Atty at public expense

Laster v St
60 Wis. 2d 525 (1973)

2) No right to "fire" Ct-appointed Atty

Rahhal v St
52 Wis. 2d 144, 147–48
(1971)
St v Batista
171 Wis. 2d 690
(Ct. App. 1992)
St v Woods
144 Wis. 2d 710
(Ct. App. 1988)

3) May not manipulate right to counsel as tool for obstruction or delay

St v Harper
57 Wis. 2d 543 (1973)

4) Entitled to "effective assistance of counsel"

a. See **Ineffective Assistance of Counsel**, **CR 41**

Faretta v California
95 S. Ct. 2525 (1975)
St v Klessig
211 Wis. 2d 194, ¶ 8
(1997)
Imani v Pollard
826 F3d 939, 944
(7th Cir 2016)

E. Def has concomitant constitutional right to represent self

1) See **Right to Represent Self**, **Sec. 8.B.**, *infra*

St v Campbell
2006 WI 99, ¶ 74
294 Wis. 2d 100

2) No right to be represented by counsel and represent self at the same time

St v Darby
2009 WI App 50
317 Wis. 2d 478

3) Ct need not inform Def of right. Def must make clear and unequivocal declaration of intent to represent self

2. Appointment of Counsel

§ 977.07(1)

A. State Public Defender (SPD) is primary, but not exclusive, means for assuring counsel to indigents

St v Dean
163 Wis. 2d 503
(Ct. App. 1991)

B. Ct has inherent power to appoint counsel when SPD declines to act and Ct determines appointment is necessary

St v Scarbrough
55 Wis. 2d 181 (1972)

1) Ct has plain duty to appoint counsel for indigent Def

St ex rel Chiarkas
v Skow
160 Wis. 2d 123 (1991)

2) Ct should appoint Atty from private bar for non-indigent individual unless no Atty available

a. Ct should appoint SPD for non-indigent individuals only in rare circumstances, given limitations on SPD services

3) When Ct makes appointment, Cty to pay

a. At conclusion of case, Ct may order reimbursement of Cty for Atty fees

St v Haynes
118 Wis. 2d 21, 27
(Ct. App. 1984)

C. Change of appointed Atty is in Trial Ct's discretion

1) Based on good cause

3. SPD Appointment of Counsel

§ 977.02(3)
Wis Adm Code ch PD 3

A. Based on rules promulgated under § 977.02(3) relating to income, assets, and anticipated cost of effective representation

§ 977.06(4)(a)

B. Ct *may* review any indigency determination on own motion or that of Def and *shall* review determination on motion of DA or SPD

St v Le
184 Wis. 2d 860 (1994)

C. Cost of out-of-Ct interpreter hired by defense counsel is charged to SPD

4. Judicial Appointment of Counsel

St v Dean
163 Wis. 2d 503
(Ct. App. 1991)

A. Ct cannot restrict itself to criteria mandated by statute for appointment of SPD

B. Standard: Does Def have sufficient income/assets to retain private counsel at market rate prevailing in community?

1) Disregard SPD's established cost of retained counsel

2) Consider fees charged by local private counsel in similar cases

3) If Ct appoints counsel for indigent Def who does not meet SPD indigency standards, Cty pays cost

St ex rel Chiarkas
v Skow
160 Wis. 2d 123 (1991)

a. Ct may order non-indigent Def to reimburse Cty

St ex rel Friedrich
v Dane Cty Cir Ct
192 Wis. 2d 1 (1995)

4) Rates of appointed counsel to be paid in accordance with SCR 81.02

Door Cty v Hayes-Brook
153 Wis. 2d 1 (1990)

a. In extraordinary cases, however (such as no Atty willing to take case at rates set forth in SCR), Ct may pay Atty higher rate

St ex rel Barth v Burke
24 Wis. 2d 82 (1964)

5) Ct must consider all circumstances and make finding on Def's financial ability to employ Atty

St v Buelow
122 Wis. 2d 465
(Ct. App. 1984)

a. Burden of proof on Def to show indigency

St v Kennedy
2008 WI App 186
315 Wis. 2d 507

b. Finding must be based on facts and not made arbitrarily

St v Dean
163 Wis. 2d 503
(Ct. App. 1991)

c. Ct not required to conduct independent inquiry, but must ask enough questions of Def to decide question, or order Def to report further to Ct on issue of indigency

C. Relevant considerations

1) Seriousness of charge

2) Whether Def in custody or working

3) Cost of retaining Atty

4) Income

5) Assets from which money can reasonably be raised

St v Nieves-Gonzalez
2001 WI App 90
242 Wis. 2d 782

6) Amount required to provide necessities of life for Def and dependents during pendency of case, i.e., federal poverty guidelines. See **Sec. 6.B.**, *infra*, for guidelines

7) Emergency costs

8) Cost of posting bond to obtain release

St v Lee
2021 WI App 12

396 Wis. 2d 136

9) Delay in the appointment of SPD Atty before preliminary hearing

a. Number of SPD contacts for appointment

b. Number of days of delay

10) Cost of Cty appointment versus cost of lengthy incarceration if delay of appointment

5. Managing Conflict of Interest

Rohl v St
65 Wis. 2d 683 (1974)

A. Def has right to separate counsel from co-Def, if interests of Defs in conflict

1) Almost always the case

St v Miller
160 Wis. 2d 646 (1991)
St v Kaye
106 Wis. 2d 1 (1982)

2) Ct should engage in colloquy with Defs at arraignment

a. Inquire regarding possibility of conflict

b. Ensure Def understands potential conflict

c. Permit knowing and insistent waiver

St v Miller
160 Wis. 2d 646 (1991)
St v Demmerly
2006 WI App 181
296 Wis. 2d 153
Wis JI-Cr SM-45

B. Ct may disqualify counsel of Def, even over accused's objection and apparent waiver of right to conflict-free representation, when actual or serious potential for conflict of interest exists

Wheat v US
108 S. Ct. 1692 (1988)

1) While there is presumption in favor of permitting Def counsel of choice, right is not absolute

St v Kaye
106 Wis. 2d 1 (1982)

2) Even serious potential for conflict does not require Ct to disqualify Atty, if Defs knowingly waive right to separate counsel and insist on having same counsel

St v Villarreal
2013 WI App 33

346 Wis. 2d 690

3) Atty who, while representing Def and witness accused of perjury, permitted police interview of witness had actual conflict that adversely affected Atty's performance

St v Miller
160 Wis. 2d 646 (1991)

4) Some factors to consider

a. Duration of Atty-client relationship

b. Amount of services already rendered

c. Availability of other lawyer of like caliber

d. Whether Atty substitution will cause delay

Caution
St v Miller
160 Wis. 2d 646 (1991)

e. Possibility that prosecutor may manufacture a conflict to eliminate formidable lawyer as adversary

Karlin v St
47 Wis. 2d 452 (1970)

C. Prosecuting Atty should never be appointed to represent indigent Def

1) Part-time DA, Ass't AG, US Atty

St v Cobbs
221 Wis. 2d 101
(Ct. App. 1998)

2) Not necessarily an actual conflict when Def's Atty is former prosecutor of Def

a. 5 years earlier and not in same case

St v Love
227 Wis. 2d 60 (1999)

b. In same case, no conflict if no failure to reveal to Def and no adverse representation

3) Conflict when Def's Atty was prosecutor in prior proceeding in same case

D. Municipal Atty (even part-time) should rarely be appointed

Recommendation

6. Procedure for Ct Determination of Indigency

A. If Def claims inability to afford counsel but is ineligible for SPD

1) Instruct Def to provide financial information

2) Have Def demonstrate to Ct that Def has attempted to retain counsel

B. Determine whether Def is indigent

1) Review Petition and Affidavit

2) If Def's income is from AFDC/W-2 benefits, or if financial information shows Def within federal poverty guidelines, Def may be considered indigent

3) Federal poverty guidelines are not the exclusive measure of indigency; many federal and state social service agencies employ an indigency benchmark higher than the federal poverty guidelines

89 FR 2961 (1/17/24)

2024 Poverty Guidelines

Size of Family Unit	Weekly	Monthly	Yearly
1	$ 290	$ 1,255	$ 15,060
2	$ 393	$ 1,703	$ 20,440
3	$ 497	$ 2,151	$ 25,820
4	$ 600	$ 2,600	$ 31,200
5	$ 703	$ 3,048	$ 36,580
6	$ 807	$ 3,497	$ 41,960
7	$ 910	$ 3,945	$ 47,340
8	$ 1,104	$ 4,393	$ 52,720
More than 8, add	+ 103	+ 448	+ 5,380

C. If Ct finds Def indigent

1) Appoint counsel from private bar (may ask SPD for local Atty certification list)

2) Compute Atty fees pursuant to SCR 81.02

3) County responsible for payment of Ct-appointed Atty fees

4) Ct may order reimbursement to Cty

a. Payment schedule

b. Wage assignment

7. Substitution or Discharge of Counsel

St v Jones
2010 WI 72
326 Wis. 2d 380

A. Indigent Def entitled to competent counsel, but not counsel of own choosing

St v Lomax
146 Wis. 2d 356 (1988)

B. Substitution of counsel within discretion of Ct

1) SPD will appoint successor counsel if Ct permits withdrawal of current counsel

St v Kazee
146 Wis. 2d 366 (1988)

C. Make inquiry of Def if Def at any time makes substantial complaint that could reasonably be interpreted as request for new counsel

St v Lomax
146 Wis. 2d 356 (1988)
St v Prineas
2009 WI App 28, ¶ 13
316 Wis. 2d 414
St v Jones
2007 WI App 248
306 Wis. 2d 340

D. Consider following factors

St v Boyd
2011 WI App 25, ¶ 13
331 Wis. 2d 697

1) Whether defense shows conflict so great that it likely results in a total lack of communication that prevents an adequate defense and frustrates a fair presentation of the case—i.e., makes continued representation untenable

St v Boyd
2011 WI App 25, ¶ 21
331 Wis. 2d 697

a. Such claim waives attorney-client privilege

2) Length of delay requested

3) Whether lead counsel has associates prepared to try case in Atty's absence

4) Whether other continuances have been requested and received by Def

5) Convenience or inconvenience to parties, witnesses, and Ct (timeliness)

a. Eleventh-hour requests generally frowned on as tactic to delay trial

b. However, last-minute bona fide conflict between Def and counsel could justify delay

6) Whether delay seems to be for legitimate reasons or is dilatory

St v McDowell
2004 WI 70
272 Wis. 2d 488

7) The perjury dilemma, see **CR 41**, **Sec. 2.E.**4) and **CR 26, Sec. 15**

Phifer v St
64 Wis. 2d 24 (1974)

8) Other relevant factors

E. Trial Ct to strike proper balance between constitutional rights of Def and efficient administration of justice

8. Waiver of Right to Counsel

St v Bangert
131 Wis. 2d 246 (1986)

A. At plea of no contest or guilty

1) By knowing and voluntary waiver of right to counsel

St v Klessig
211 Wis. 2d 194 (1997)

B. To represent self at trial

St v Klessig
211 Wis. 2d 194, ¶ 9
(1997)
Imani v Pollard
826 F3d 939, 944
(7th Cir 2016)

1) By knowing and voluntary waiver of right to counsel

Indiana v Edwards
128 S. Ct. 2379 (2008)
St v Klessig
211 Wis. 2d 194 ¶ 9
(1997)
Imani v Pollard

826 F3d 939, 944
(7th Cir 2016)

2) By demonstrating competency to represent self

Faretta v California
95 S. Ct. 2525 (1975)

3) Persons of average ability have independent constitutional right to represent selves

Imani v Pollard
826 F3d 939, 944
(7th Cir 2016)
Wis JI-Cr SM-30

4) Determining competency to represent self

St v Klessig
211 Wis. 2d 194 (1997)

a. By colloquy with Def on the record

- Deliberate choice to represent self
- Aware of difficulties and disadvantages of self-representation
- Aware of seriousness of charge(s)
- Aware of general range of penalties

Indiana v Edwards
128 S. Ct. 2379 (2008)
(distinguishing *Godinez v Moran*, 113 S. Ct. 2680
(1993))

b. Requires more than mental competency to proceed or plead guilty

- Is more than merely understanding charges and being able to assist counsel

Imani v Pollard
826 F3d 939, 944
(7th Cir 2016)

c. Average person competent to represent self, unless specific problem or disability exists, which may prevent meaningful defense from being offered

d. Factors to consider

- Background of Def

— Education

— Literacy

— Fluency in English

— Physical or psychological condition that may significantly affect ability to communicate defense to jury

- Experience of Def

— Familiarity with courtroom proceedings

— Awareness of difficulties and disadvantages of self-representation

— Appreciation of seriousness of charge

— Knowledge of general range of possible penalties

- Conduct of Def must demonstrate intentional relinquishment of known right to counsel

St v Divanovic
200 Wis. 2d 210
(Ct. App. 1996)

C. Forfeiture of counsel explicitly or by conduct

St v Cummings
199 Wis. 2d 721 (1996)
St v Haste
175 Wis. 2d 1
(Ct. App. 1993)
St v Woods
144 Wis. 2d 710
(Ct. App. 1988)

1) When Def repeatedly, despite warnings that trial will proceed, refuses to accept services of appointed counsel, and refuses to represent self, Def can forfeit right to lawyer by conduct, by operation of law

St v Batista
171 Wis. 2d 690
(Ct. App. 1992)

2) Right to counsel cannot be manipulated so as to obstruct orderly procedure of Cts

St v Verdone
195 Wis. 2d 476
(Ct. App. 1995)

3) State's burden to show Def's conduct demonstrated forfeiture

a. Timeliness is factor

b. Intent to delay is factor

St v Haste
175 Wis. 2d 1
(Ct. App. 1993)

c. Disruptive conduct not enough

- Def's purpose must be to frustrate case progress

St v Verdone
195 Wis. 2d 476
(Ct. App. 1995)

4) No forfeiture of counsel presumed from silent record

St v Suriano
2017 WI 42
374 Wis. 2d 683
St v Cummings
199 Wis. 2d 721 (1996)

5) Five recommended steps

a. Warning that continuing Def's specific conduct will lead to finding that right to counsel forfeited

b. Colloquy with Def about difficulties and dangers of self-representation

c. Colloquy with Def about competency to represent self (See **Sec. 8.B.**4), *supra*)

d. Clear ruling when right to counsel forfeited

e. Factual findings on each of the above steps

9. Standby Counsel

St v Cummings
199 Wis. 2d 721 (1996)

A. For convenience of Trial Ct, not Def

Mayberry v Pennsylvania
91 S. Ct. 499 (1971)

B. When there is doubt that Def has ability to represent self, Atty can be appointed to

1) Familiarize self with case and

2) Stand by as consultant on matters of

a. Examination

b. Cross-examination

c. Objecting to evidence

d. Making closing argument

St v Haste
175 Wis. 2d 1
(Ct. App. 1993)

C. Standby Atty can also protect rights of Def if Def removed from courtroom for misconduct by resuming full representation

St v Campbell
2006 WI 99
294 Wis. 2d 100

D. Ct may impose fees on Def under certain circumstances

10. Out-of-State Counsel

St v Mosley
201 Wis. 2d 36
(Ct. App. 1996)

A. Out-of-state counsel not a violation of SCR 10.03(4) if local counsel also appears and participates

B. Local counsel must be available, not necessarily present, at every stage of trial

CR 4: REMOTE PROCEEDINGS

§ 967.08

1. Live Audiovisual/Telephonic Proceedings

A. Ct may conduct live audiovisual/telephonic proceedings for any proceeding under Chs 968–973

§ 967.08(1)

1) Upon any party's motion or Ct's own motion

§ 967.08(2), (4)

2) Upon consent of both parties for critical stage of proceedings

See St v Soto
2012 WI 93
343 Wis. 2d 43
See St v Anderson
2017 WI App 17
374 Wis. 2d 372
RMC Form CR-295

a. Ct must have colloquy with Def to ensure consent is made freely, voluntarily, and intelligently

b. Judge must ensure that Def and counsel can hear, see, and speak to the Judge, and vice versa

St v Anderson
2017 WI App 17, ¶ 42
374 Wis. 2d 372

- Ct should inquire as often as reasonably possible throughout proceeding if Def is able to hear and understand (especially if proceeding by telephone)

- Ct should inform Def that if Def is unable to see or hear anything during the proceeding, Def should let Ct know and it will be repeated

c. Judge should inform Def of right to not proceed by telephone or live audiovisual means

§ 967.08(5)

3) If any party objects for non-critical stage of proceeding, Ct must consider factors in § 885.56 (*see* **Sec. 3**, *infra*) to determine whether to sustain or overrule objection

B. Requirements

§ 967.08(1)

1) Must be held in courtroom or other place reasonably accessible to public

§ 967.08(1)

2) Anyone entitled to attend must have simultaneous access to proceeding, without cost

St ex rel Christie v Husz
217 Wis. 2d 593
(Ct. App. 1998)

Ct's responsibility to ensure self-represented Def able to appear

§ 967.08(1)

3) If reporting required, Ct reporter must have simultaneous communication with all parties

C. Same effect as personal appearance in Ct

§ 967.09

D. Interpreter may appear remotely

Wright v Van Patten
128 S. Ct. 743 (2008)

E. Def's presence in Ct with Def Atty on telephone during plea colloquy has been held not to presumptively violate 6th Amendment right to effective assistance of counsel

§ 885.60(2)(b)

F. Witnesses via videoconferencing technology at evidentiary hearing, trial, or fact-finding hearing

1) Proponent of witness via videoconferencing technology must file notice 20 days before start of proceeding

2) Opposing party may file objection within 10 days after filing of notice

G. See CR 33, Defendant Presence/Disruption, Sec. 1.A., for proceedings when Def has right to be present at proceeding either personally or by telephone or live audiovisual means

§ 885.54
Wis JI—Crim SM-18

2. Requirements of Videoconferencing Technology

A. Participants must be able to hear, see, and communicate with each other

B. Participants must be able to hear, see, and otherwise observe any physical exhibits or evidence

C. Adequate video/sound quality as if in courtroom

D. Ability for courtroom cameras to scan the courtroom

E. Option for counsel to be present with Def at remote location and ability to mute microphone system to allow for private communication

F. Means to transfer documents between courtroom and remote location

G. Private voice communication facility if Def and counsel are not in same location to allow for private communication

H. Proceeding must be visible and audible to jury and public to same extent as if proceeding were not by videoconference

Recommendation

Ct should consider asking Def to identify anyone else present with Def at remote location

§ 885.56
§ 967.08(5)

3. Criteria to Consider When Ct Exercises Discretion to Allow Videoconferencing Technology

A. Undue surprise/prejudice

B. Efforts to procure witness physically

C. Convenience and cost

D. Full cross-examination/use of exhibits

E. Importance of physical presence for truthful testimony

F. Physical liberty or fundamental interest involved

G. Ct's control over remote location

H. Participation of witness remotely results in negative diminishment or distortion

I. Decrease in formality of proceeding and effect on fairness/effectiveness

J. Witness presents a security risk if in person

K. Stipulations and waivers by parties for video appearance

CR 5: PUBLIC TRIAL

1. Open Court in General

Billy Jo W v Metro
(In re Mental Condition
of Billy Jo W)
182 Wis. 2d 616 (1994)

A. Legislature and Cts are reluctant to shield judicial process from public view

St v Vanness
2007 WI App 195
304 Wis. 2d 692

B. Open Ct protects Def's rights—closing courthouse doors during trial requires new trial

St v Ndina
2007 WI App 268
306 Wis. 2d 706
aff'd on other grounds
2009 WI 21
315 Wis. 2d 653

1) Absent objection, removing disruptive family member does not deprive Def of public trial

St v Small
2013 WI App 117, ¶¶ 8–
12, 351 Wis. 2d 46

2) Ct has authority to exclude individuals to protect integrity of trial (e.g., persons who threatened witness)

C. Open Ct assures public that judicial officials and justice system are operating properly

2. Right to Attend

A. Constitutional and statutory right of

Wis Const art I, § 7
§ 757.14

1) General public

Richmond Newspapers, Inc v Virginia
100 S. Ct. 2814 (1980)

2) News media, not using electronic or still photographic equipment in courtroom

St ex rel LaCrosse Tribune v Cir Ct
115 Wis. 2d 220 (1983)

B. All sittings of Ct, whether in chambers or in courtroom are presumptively open to public. Includes

St v Pinno
2014 WI 74
356 Wis. 2d 106

1) Entire jury selection process

St ex rel Storer Broadcasting v Gorenstein
131 Wis. 2d 342
(Ct. App. 1986)

2) Voir dire examination of jurors in chambers

St ex rel Wis State Journal v Cir Ct
131 Wis. 2d 515
(Ct. App. 1986)

3) Reexamination of person committed after finding of not guilty by reason of mental disease or defect

Press-Enterprise Co v Superior Ct
106 S. Ct. 2735 (1986)
St ex rel Stevens v Cir Ct
141 Wis. 2d 239 (1987)

4) Prelims

St ex rel Newspapers Inc v Cir Ct
65 Wis. 2d 66 (1974)

5) Immunity hearings in John Doe proceedings

St ex rel Newspapers Inc v Cir Ct
124 Wis. 2d 499 (1985)

6) Ex parte requests for Judge to issue criminal charges under § 968.02(3)

C. Permissive right of news media, when

Chandler v Florida
101 S. Ct. 802 (1981)

1) Using electronic or still photographic equipment in courtroom

2) Subject to provisions outlined in SCR Ch 61

3. Motion to Close Pretrial Proceedings

Gannett Co v DePasquale
99 S. Ct. 2898 (1979)

A. Both State and Def may move to close pretrial proceedings

1) May act singly or together

2) Def's Atty may bring motion without consent of Def

Comment

a. But 6th Amendment right to a public trial belongs to Def

B. Burdens of parties making motion

St ex rel Stevens v Cir Ct
141 Wis. 2d 239 (1987)

1) Moving parties must establish compelling circumstances justifying closure

C. Public or news media have right to be heard on closure request

Gannett Co v DePasquale
99 S. Ct. 2898 (1979)
St ex rel Newspapers Inc
v Cir Ct
65 Wis. 2d 66 (1974)

1) Public or news media have standing, if

a. Present at hearing, and

b. Excluded by closure order

2) Burden to show that reasonable alternatives available to eliminate dangers shown by State or Def

Wis Const art I, § 7
St ex rel Newspapers Inc
v Cir Ct
65 Wis. 2d 66 (1974)

3) Any citizen denied access to Ct proceeding has standing to bring separate action to enforce statutory right of access

St ex rel Stevens v Cir Ct
141 Wis. 2d 239 (1987)

D. Motion addressed to sound discretion of Ct

1) Ct has inherent power to limit admission of public to courtroom in interests of justice

a. Circumstances justifying closure must be compelling

b. Must appear to be reasonable likelihood that very purpose of trial will be subverted or other cherished and legislatively recognized values would be jeopardized

Billy Jo W v Metro (In re Mental Condition of Billy Jo W)
182 Wis. 2d 616 (1994)

c. When Def requests closure, Ct balances request against public's interest in understanding and maintaining confidence in Cts

St v Pinno
2014 WI 74,¶ 72
356 Wis. 2d 106

2) When parties ask or the Ct independently considers closing the courtroom, Judge must:

a. Hold hearing on issue of closure, open to parties and members of public present in Ct, and ensure the following requirements are met:

- Party advocating for closure bears the burden;
- Ct must find an overriding interest that is likely to be prejudicial;
- Closure must be narrowly tailored to protect the overriding interest;
- Judge must consider reasonable alternatives to excluding the public; and
- Judge must make specific findings to support exclusion

St v Dean
67 Wis. 2d 513 (1975)
ABA Stds—Fair Trial & Free Press § 8-3.2 (1992)

3) Grant closure motion in pretrial proceedings only if no reasonable alternatives exist to prevent substantial likelihood that pretrial publicity will interfere with Def's due-process rights

a. Make proper record

Nebraska Press Ass'n v Stuart
96 S. Ct. 2791 (1976)
Sheppard v Maxwell
86 S. Ct. 1507 (1966)

4) Reasonable alternatives to closing pretrial proceedings include

a. Continuance

b. Change of venue

c. Voir dire

d. Specific instruction to jury on duty to ignore all information about case from extrajudicial sources

St v Dean
67 Wis. 2d 513 (1975)
Stelloh v Liban
21 Wis. 2d 119 (1963)
St ex rel Ampco Metal v O'Neill
273 Wis. 530 (1956)

e. In camera inspection of potentially prejudicial evidence, statements, confessions, and other sensitive information

Recommendation

- Order sealing of material while public hearing is conducted

St ex rel Goodchild v Burke
27 Wis. 2d 244 (1965)

Example: In many cases, *Goodchild* hearings are concerned with circumstances that led up to confession, rather than contents of confession, so confession can be sealed during *Goodchild* hearing.

f. Voluntary agreement by news media not to disseminate evidence adduced at any pretrial proceeding

E. Postconviction motions challenging closure of courtroom

Weaver v Massachusetts
137 S. Ct. 1899, 1912–13 (2017)

If courtroom closed erroneously during jury selection but Def does not object, and if Def asserts ineffective assistance, structural error doctrine does not apply; Def must demonstrate prejudice

F. Specific proceedings

§ 968.26
St ex rel Newspapers Inc v Cir Ct
65 Wis. 2d 66 (1974)

1) John Doe proceedings for which secrecy order issued—*See* **CR 48**, **John Doe Proceedings**, **Sec. 2.F.**

§ 757.14

2) Minors may be excluded from trial when graphic or obscene evidence presented

§ 970.03(4)

3) At request of complaining witness, Ct may close prelim in sexual assault matter

St ex rel Stevens v Cir Ct
141 Wis. 2d 239 (1987)

a. Notwithstanding § 970.03(4), Def has qualified 6th Amendment right to open hearing

b. Prelims presumptively open

St v Webb
154 Wis. 2d 320
(Ct. App. 1990)
rev'd on other grounds
160 Wis. 2d 622 (1991)

c. Party seeking closure must show specific overriding interest likely to be prejudiced by open hearing

4. Restriction of Extrajudicial Statements

Sheppard v Maxwell
86 S. Ct. 1507 (1966)

A. Ct has inherent power to restrict extrajudicial statements of Attys, parties, witnesses, Ct officials, and police

Comment

1) Power should be used cautiously and sparingly

Comment

2) Examine all alternatives, including voluntary restraint

3) SCR 20:3.6 imposes limitations on Attys' public statements in criminal matter

Nebraska Press Ass'n
v Stuart
96 S. Ct. 2791 (1976)

B. Judge may not prevent news media from disseminating information obtained from

1) Public records

2) Ct proceedings

3) Participants

5. Cameras in Courtroom

SCR 61.02(2)

A. Notice

1) 3 days' notice required to Judge, before date media intends to bring cameras or equipment into courtroom

2) Waiver of notice requirement within discretion of Judge for cause

B. Prohibitions

SCR 61.07

1) Recording, broadcasting, or audio pick-up of conferences prohibited between

a. Atty and client, or

St v Wilson
149 Wis. 2d 878 (1989)

- If Def objects to placement of microphone at counsel table, Ct better advised to order microphone removed from defense table

b. Atty and co-counsel, or

c. Attys and Judge at bench

SCR 61.11

2) Photographing, recording, or broadcasting certain proceedings prohibited

a. Upon request of participant, with cause

- Presumption of validity accorded request
- Judge to exercise broad discretion

b. Upon Judge's own motion, with cause

c. Applicable to proceedings involving

- Victims of crimes, including sex crimes
- Police informants
- Undercover agents
- Relocated witnesses and Juvs
- Evidentiary suppression hearings
- Divorces

- Trade secrets
- Others, in discretion of Judge

SCR 61.11(2)

3) Photographing individual jurors prohibited

a. Purpose: To provide maximum protection for jury anonymity

b. Exceptions

- If individual juror(s) consent, or
- If jury part of unavoidable background

— No close-ups that identify individual jurors

SCR 61.12

4) Photographing or recording prohibited by any person or organization not part of news media

Forsythe v FCC of Dane Cty, 131 Wis. 2d 322, 327 (1986)

a. Except parties have right to make records for their own use of proceedings in which they participate

City of Oak Creek v King 148 Wis. 2d 532 (1989)
St ex rel Stevens v Cir Ct 141 Wis. 2d 239 (1987)

5) News gatherers do not have any greater right of access than does general public

C. Limitations

SCR 61.03(1)

1) Cameras

a. 3 TV cameras, each operated by 1 person

b. 3 still photographers, each using no more than 2 cameras

SCR 61.03(2)

c. Judge may authorize additional cameras or persons, upon request by media coordinator

d. Judge may limit number of cameras

- If circumstances require limitation

SCR 61.03(3)

2) 1 audio system for radio broadcast purposes

SCR 61.03(3)

3) Audio pick-up equipment

a. Audio pick-up must be connected to existing Ct audio system, if practical

b. Otherwise, microphones and related wiring must be as unobtrusive as possible

SCR 61.04

4) Equipment noise and light criteria

a. Equipment may not produce distracting noise or light

b. No artificial lighting devices used

c. All equipment must be approved by Judge before proceeding

SCR 61.06

5) Existing courtroom lighting may not be modified, unless

a. Judge approves, and

b. Other authorities approve, if required

6) Media conduct

SCR 61.05(1)

a. Media personnel may use only public areas of courtroom designated by Judge

SCR 61.05(1)

b. Media personnel must not block view of persons seated in public area of courtroom

SCR 61.05(2)

c. No movement of equipment or camera operators allowed

SCR 61.08

d. No audio or visual equipment operated during recesses

SCR 61.10

D. Disputes on Application of Rules

1) Referred to Chief Judge of district

a. Chief Judge to work with district media coordinator

2) No appellate review available from Trial Judge's or Chief Judge's ruling

6. Sealing Court Records—See Civil Benchbook, Ch CV 5, Sec. 12

CR 6: ISSUING WARRANTS/SUBPOENAS

WARRANTS

1. Arrest Warrant

§ 757.69(1)(b)

A. May be signed by Judge or Circuit Ct Comm'r and all references to Judge in this section include both

B. Must be based on complaint

§ 968.01(2)

1) Complaint is written statement of essential facts constituting crime charged, made on information and belief and upon oath before DA or Judge

§ 968.01(3)

a. Use of telephone: Complaining witness may make statement under oath by phone with DA and Judge

§ 968.01(4)

- Immediately thereafter, complainant's signed statement must be transmitted by fax or electronically transmitted and accompanied by the person's electronic signature to DA or Judge

968.01(3)

- Original signed statement must also be sent to DA or Judge if originally transmitted by fax

- Both original and fax copy must be filed under § 968.02

St v Olson
75 Wis. 2d 575 (1977)

2) Complaint is self-contained charge setting forth facts together with any reasonable inferences that lead reasonable person to believe Def committed a crime

§ 968.02(2)

3) Complaint issued and filed with Judge who issues warrant or summons or dismisses for lack of probable cause

C. When issued

§ 968.04(1)

1) When probable cause to believe offense committed by Def

a. Based on complaint, affidavits, or testimony of complainant or witnesses under oath

§ 968.04(1)(d)

b. Use of telephone: Complainant or witness may testify by phone at request of person seeking warrant, unless good cause to contrary

- Judge places each witness under oath and arranges for recording testimony by Ct reporter or by voice recording device
- Judge has record transcribed and transcript, certified as accurate by Judge or reporter, filed with Ct
- Original tape recording filed by Judge

St v Williams
47 Wis. 2d 242 (1970)

2) Magistrate may ask questions to satisfy self that probable cause exists, but transcript of hearing may not substitute for requirement that complaint recite probable cause

St ex rel Pflanz v Cty Ct
36 Wis. 2d 550 (1967)

3) Showing of facts and circumstances must be sufficient for neutral magistrate to make own independent determination of probable cause

§ 968.04(2)(a)

4) DA may issue summons in lieu of requesting warrant after issuing complaint

§ 968.04(2)(b)

a. In misdemeanor actions with penalties of 6 months or less, Judge must issue summons instead of warrant, unless reason to believe Def will not appear in response to summons

§ 968.04(2)(b)

b. Judge may elect to issue summons instead of warrant in any case

§ 968.04(3)(a)8.

c. Summons and complaint may be on same form

D. Mandatory provisions

1) Warrant shall

§ 968.04(3)(a)1.

a. Be in writing and signed by Judge

§ 968.04(3)(a)2.

b. State name of crime and section charged and number of section allegedly violated

§ 968.04(3)(a)3.

c. Have copy of complaint attached

§ 968.04(3)(a)4.

d. State name of person to be arrested or, if not known, designate person by reasonably certain description

§ 968.04(3)(a)5.

e. State date warrant issues, name of Judge, and title of Judge's office

§ 968.04(3)(a)6.

f. Command that person be arrested and brought before issuing Judge or other Judge in same county

2. Search Warrant

A. Definition

US Const amend IV
Wis Const art I, § 11
§ 968.12(1)
§ 968.12(4)

1) Order directing officer to conduct search or seizure of designated person, place, or thing, and/or designated property or kinds of property

§ 757.69(1)(b)

2) The persons, places, or things to be searched or seized shall be stated with particularity

§ 757.69(1)(b)

3) May be signed only by Judge or Circuit Ct Comm'r (all references to "Judge" include both)

§ 968.12(4)
§ 968.13(1)

4) May be issued anywhere in the State for a search anywhere in the State pertaining to a crime committed anywhere in the State or outside of the State

B. Basis for Issuance

§ 968.12(1)
§ 968.12(2)

1) Request for search warrant based on the applicant's information and belief showing probable cause

Illinois v Gates
103 S. Ct. 2317 (1983)

a. Determination of probable cause based on totality of circumstances

Illinois v Gates
103 S. Ct. 2317 (1983)

b. Information presented may be based on hearsay, provided one can conclude under totality of circumstances that informant credible and information obtained in reliable manner

St v Lopez
207 Wis. 2d 413
(Ct. App. 1996)

c. Information presented need not be drafted with elaborate specificity

C. Procedures for Issuance

§ 968.12(2)
§ 968.12(3)(a)

1) Information supporting warrant may be presented in sworn written affidavit or complaint, or by sworn oral testimony communicated to the Judge by telephone, radio, or other means of electronic communication

§ 968.12(2)

a. Contents of warrant based on written affidavit may be sworn to before notary or Judge. If sworn before Judge, need not be face-to-face. Judge shall indicate on warrant that person so swore to the affidavit

§ 968.12(3)(e)

b. The contents of a warrant based on oral testimony shall be the same as contents of a warrant based on affidavit

§ 968.12(5)

2) Person requesting warrant may sign by using an electronic signature, handwritten signature, or a handwritten signature that is electronically imaged

3) Duplicate originals

§ 968.12(3)(b)1.

a. Person requesting warrant reads the duplicate original warrant to Judge

§ 968.12(3)(b)1.

b. Judge shall enter verbatim what is read on original warrant or may modify the warrant

§ 968.12(3)(b)1.

c. If probable cause for warrant, Judge shall issue warrant by directing requester to sign the Judge's name on duplicate original. Requester shall also sign own name

§ 968.12(3)(b)1.

d. Immediately, when available, Judge shall sign original warrant and enter exact time warrant was ordered

4) Electronic transmission

§ 968.12(3)(b)2.

a. Person requesting warrant signs warrant and transmits to Judge

§ 968.12(3)(b)2.

b. Judge may modify the warrant

§ 968.12(3)(b)2.

c. If probable cause for warrant, Judge shall sign and enter exact time

§ 968.12(3)(b)2.

d. Judge shall immediately transmit signed warrant to requester

5) Recording and certification

§ 968.12(3)(d)

a. Judge shall place under oath each person whose testimony forms basis for application and each person applying for warrant

§ 968.12(3)(d)

b. Judge or requester shall arrange for all sworn testimony to be recorded by Ct reporter or by voice recording device

§ 968.12(3)(d)

c. Judge shall have recording transcribed and shall be certified as accurate by Judge or reporter

§ 968.12(3)(d)

d. Transcript must be filed with Ct

D. Property subject to seizure

§ 968.13(1)

1) Search warrant may authorize seizure of

§ 968.13(1)(a)

a. Contraband

§ 968.13(1)(b)

b. Anything that is fruit of, or used in commission of, any crime or non-criminal OWI violation

§ 968.13(1)(c)

c. Anything other than documents that may be evidence of any crime

§ 968.13(1)(d)

d. Documents that are evidence of any crime, with probable cause showing they are under control of person reasonably suspected to be party to that crime under § 939.05(2)

§ 968.135

2) Documents may be obtained by subpoena rather than search warrant

§ 968.135

a. Ct may issue subpoena requiring production of documents upon

- Request of AG or DA, and
- Showing of probable cause under § 968.12(1)

§ 968.135

b. Documents returned to and motions to limit or quash subpoena must be addressed to issuing Ct

§ 968.135

c. Person failing to comply may be compelled to do so according to Ch 785, Contempt of Ct

St v Hayes
196 Wis. 2d 753
(Ct. App. 1995)

E. Search warrant may authorize search of unnamed persons on premises to be searched as long as basis in affidavit

Richards v Wisconsin
117 S. Ct. 1416 (1997)

F. "No-knock" warrants

St v Cleveland
118 Wis. 2d 615 (1984)
St v Watkinson

161 Wis. 2d 750
(Ct. App. 1991)

1) "No-knock" warrant may be issued if specific evidence of danger to safety or destruction of evidence presented

St v Whiting
2003 WI App 101
264 Wis. 2d 722

a. Police must be aware of such evidence at time of entry

G. "Anticipatory" warrants

St v Meyer
216 Wis. 2d 729 (1998)

1) Not required that warrant contain explicit statement that delivery of contraband must occur before execution of warrant

2) Affidavit must demonstrate that contraband is on sure course to premises to be searched

St v Falbo
190 Wis. 2d 328
(Ct. App. 1994)

3) Do not violate 4th Amendment if limited to execution during a limited time period

3. Probable Cause Necessary for Arrest or Search Warrant

St v Lee
157 Wis. 2d 126
(Ct. App. 1990)

A. Equated with "a fair probability"

1) Must be sufficient facts to support honest belief in reasonable mind that crime committed

St v Ehnert
160 Wis. 2d 464
(Ct. App. 1991)

2) Fluid concept based on commonsense assessment of probabilities in particular factual situation

3) To be determined under practical considerations of everyday life on which reasonable and prudent persons act

St v Higginbotham
162 Wis. 2d 978 (1991)
St v Lindgren,
2004 WI App 159,
275 Wis. 2d 851

4) Quantum of evidence necessary to establish probable cause less than that required to support bindover at prelim

5) Facts must provide more than mere hunch or bare recital of legal conclusions by officer

St v Multaler
2002 WI 35
252 Wis. 2d 54

6) Facts must present fair probability that object sought in search warrant will be found in place to be searched

St v Ehnert
160 Wis. 2d 464
(Ct. App. 1991)

B. "Stale" facts not sufficient to support search warrant

St v Moley
171 Wis. 2d 207
(Ct. App. 1992)

1) Facts proved must justify finding of probable cause at time search warrant issued

2) Staleness not determined by specific number of days or months between occurrence of facts and issuance of warrant

3) Passage of time less significant when activity of protracted, continuous nature

4) Relevant factors to determination of staleness

a. Nature and pattern of criminal activity under investigation

b. Nature of what sought

St v Noll
111 Wis. 2d 587
(Ct. App. 1983)
aff'd 116 Wis. 2d 443
(1984)
St v Nicholson
174 Wis. 2d 542
(Ct. App. 1993)

5) Defective portion of warrant does not necessarily invalidate entire warrant or fruits

SUBPOENAS

1. Definition

81 Am Jur 2d *Witnesses*
§§ 6, 10, 12, 13

A. Writ for compelling attendance of person before Ct or other tribunal at time and place designated

1) To testify as witness until dismissed by Ct

B. Witness cannot disregard authority of Ct before which summoned

1) Even if believes testimony irrelevant

C. Propriety of subpoena for Ct to decide

2. Statutory Authority

§ 757.01(1)

A. Cts of record have power to issue subpoenas requiring attendance of any witness residing or in State to testify in any matter

§ 885.01

1) Need not be sealed

§ 885.01(1)

2) May be issued by any Judge, Clerk of Ct, Ct Comm'r, or Municipal Judge within jurisdictional territory to require attendance of witnesses and production of evidence in any pending matter

§ 805.07(2)

B. May command person to produce books, papers, documents, electronically stored information, or tangibles designated

§ 805.07(3)
St ex rel
Green Bay Newspaper Co
v Circuit Ct
113 Wis. 2d 411 (1983)
St v Groppi
41 Wis. 2d 312 (1969),
vacated on other grounds
91 S. Ct. 490 (1971)

C. Ct may quash, modify, or conditionally approve subpoena upon prompt motion

§ 805.07(3)

1) Ct may quash or modify subpoena, if unreasonable and oppressive, or

§ 805.07(3)

2) Ct may conditionally approve subpoena, upon advancement of reasonable costs of producing materials by person requesting subpoena to person subpoenaed

§ 885.10

D. Upon satisfactory proof of Def's inability to procure witness for defense, Judge may direct witness to be subpoenaed as necessary and proper upon Def's or Atty's oath or affidavit

§ 968.09(1)

E. If subpoenaed witness fails to appear, Ct may issue bench warrant

§ 969.01(3)

F. In a felony case, upon affidavit showing witness's testimony is material and that it is impracticable to serve subpoena, Ct may issue a material witness warrant and require witness to post bail

§ 976.02(2)(a)

G. In an out-of-state case, upon receipt of certification of out-of-state Judge that the person is a material witness to a criminal prosecution or grand jury proceeding, Wis Ct to set hearing on whether witness must appear in other state

§ 976.02(2)(b)

1) If Wis Ct finds that witness is material and necessary, there is no undue hardship, and that the other state (and any states through which witness must pass) will protect witness from arrest and service of process, Wis Ct shall issue summons directing witness to attend and testify in other state's Ct

§ 976.02(2)(c)

2) If out-of-state Judge's certificate recommends that witness be taken into custody, Wis Ct may waive notice of hearing and direct that witness be brought before Wis Ct

a. Upon hearing, Wis Ct may order that witness be taken into custody and delivered to officer of other state

3. Constitutional Compulsory Process

US Const amend IV
Wis Const art I, § 7
Taylor v Illinois
108 S. Ct. 646 (1988)
St v Sorenson
152 Wis. 2d 471
(Ct. App. 1989)

A. Def entitled to compulsory process to obtain witnesses in own behalf

Washington v Texas
87 S. Ct. 1920 (1967)

1) Right is fundamental and essential to fair trial

St v Wallis
149 Wis. 2d 534
(Ct. App. 1989)

a. Motion to quash subpoena should not be granted lightly

b. Standard applied on motion to quash

- Whether Def can show reasonable probability that subpoenaed witness's testimony will lead to competent, relevant, material, and exculpatory evidence

2) Right no more absolute than any other constitutional right

3) May be limited to witnesses who can offer relevant or material evidence on Def's behalf

Michigan v Lucas
111 S. Ct. 1743 (1991)

a. Trial Judge retains wide latitude to limit, reasonably, Def's right to compulsory process

St v Thompson
146 Wis. 2d 554
(Ct. App. 1988)

4) Def has no right to present evidence that is not relevant

§ 885.03

B. Witness in criminal case may be properly served with subpoena by:

1) Exhibiting and reading it to witness; or

2) Giving the witness a copy; or

3) Leaving subpoena at the witness's abode

St v Wilson
2017 WI 63, ¶ 36
376 Wis. 2d 92

a. Reasonable diligence to serve personally is not required

4. Subpoena *Duces Tecum*

§ 805.07(2)

A. Subpoena commanding production of books, papers, documents, electronically stored information, or tangibles designated

Nashban Barrel Co v
GG Parsons Trucking Co
49 Wis. 2d 591 (1971)

1) Relevancy of requested documents need not be alleged in fact

2) Must be complied with in absence of reasonable excuse

3) Question of reasonableness is for Ct

US v Nixon
94 S. Ct. 3090 (1974)
Custodian of Records
for LTSB v St
2004 WI 65,
272 Wis. 2d 208,
amended and
reconsideration denied
2004 WI 149
277 Wis. 2d 75

B. Disclosure sought shall not be unreasonable

1) Must show documents sought are relevant to inquiry and adequate

2) May not be excessive for its purpose

3) Relevancy and adequacy vary in relation to nature, purpose, and scope of inquiry

Oklahoma Press
Publ'g Co v Walling
66 S. Ct. 494 (1946)

4) Privilege against self-incrimination gives no protection to corporations or their officers against production of corporate records by subpoena

Neu's Supply Line v Dept of Rev 52 Wis. 2d 386 (1971)

C. When factual dispute on relevancy arises, must present evidence to Ct

§ 968.135

5. Subpoena for Documents

§ 968.13(2)

A. "Documents" includes, but is not limited to, books, papers, records, recordings, tapes, photographs, films, or computer or electronic data

B. AG or DA may request a subpoena for documents

1) Request must show probable cause

C. Ct shall issue subpoena and documents shall be returnable to the Ct

D. Motions, including to quash or limit the subpoena, must be heard by issuing Ct

E. Production of documents may be compelled by finding of contempt

6. Electronic Records and Devices

A. Interception of Wire, Electronic, or Oral Communications

1) Refers to real-time monitoring and recording of communications, i.e., wiretaps

2) Must be requested by AG and DA

Caution

3) May be issued **only** by chief judge

4) *See* **CR 45**, **Electronic Surveillance**

B. Pen Registers/Trap and Trace Devices

§ 968.27(13)

1) *Pen register* is a device that records or decodes electronic or other impulses that identify numbers dialed or otherwise transmitted on the line to which the device is attached

§ 968.27(15)

2) *Trap and trace device* is a device that captures incoming electronic or other impulses that identify the originating number of an instrument or device from which a wire or electronic communication was transmitted

§ 968.35(1)

3) AG or DA may request order authorizing or approving installation or use of pen register or trap and trace

§ 968.36(1)

4) Ct shall enter ex parte order authorizing if Ct finds that the information likely to be obtained is relevant to an ongoing criminal investigation

§ 968.36(3), (4)

5) Order is valid for up to 60 days, with a 60-day extension upon a new application with grounds

§ 968.36(5)

6) Order shall be sealed and shall provide that existence of the device or investigation not be disclosed to the subscriber or any other person

C. Warrant to Track a Communications Device

§ 968.373(3)

1) AG or DA may request warrant

§ 968.373(3)(e)

2) Application must show certain identifying information and that there is probable cause to believe criminal activity has been, is, or will be in progress and that identifying or tracking the device will yield relevant information

Carpenter v US
138 S. Ct. 2206 (2018)

a. Even obtaining historical cell-phone location data is a search within the 4th Amendment and requires a showing of probable cause

§ 968.373(3)

3) Application may be made orally or in writing

§ 968.373(4)

4) Warrant is valid for up to 60 days, with an unlimited number of 60-day extensions upon request showing that grounds continue to exist

§ 968.373(6m)

5) A return shall be filed not later than 5 days after the information is received

§ 968.373(4m)

6) Ct may issue order sealing application and prohibiting disclosure of the existence of the warrant and investigation

§ 968.375

D. Subpoena and Warrants for Records or Communications of Customers of Electronic Communication Service or Remote Computing Service Provider

§ 968.375(2)

1) Subpoena

a. AG or DA may request subpoena

§ 968.375(2)(a)

b. Request for subpoena must show probable cause

§ 968.375(2)(a)

c. Ct may issue subpoena requiring a person who provides electronic communication service or remote computer service to disclose within a reasonable time a record or other information pertaining to a customer of the service, including:

- Name
- Address
- Local/long distance telephone records, including times and durations
- Length of service, start date, types of service
- Telephone, instrument, subscriber, or other number or identity, including temporarily assigned network address
- Means/source of payment for service, including credit card or bank account number

§ 968.375(2)(b)

d. Subpoena may **not** require disclosure of the contents of communications

§ 968.375(3)

2) Warrant

§ 968.375(3)

a. AG or DA may request a warrant

§ 968.375(3)

b. Request for warrant must show probable cause

c. Ct may issue warrant requiring a person who provides electronic communication services or remote computing service to disclose within a reasonable time:

§ 968.375(2)(a)
§ 968.375(3)(b)

- Same information as for a subpoena (above), and/or

§ 968.375(3)(a)

- Content of a wire or electronic communication that is in electronic storage in an electronic communications system or held or maintained by a provider of remote computing service

§ 968.375(3)(c)

- A record or information that identifies the location of a device used to transmit electronic or wire communications

§ 968.375(4)
§ 968.12

3) Either subpoena or warrant may be applied for and/or issued by affidavit or oral testimony using same standards as for issuance of search warrant

§ 968.375(9)

4) A return shall be filed within 5 days after receipt of records or information

§ 968.375(10)

5) Ct may seal subpoena, warrant, affidavit, or testimony and may issue order prohibiting person served from disclosing to the customer or subscriber

E. Installation of GPS Devices on Vehicles or in Objects

St v Pinder
2018 WI 106
384 Wis. 2d 416

1) Ct order required but is not a search warrant and is not subject to search warrant limitations or return requirements

a. Order is issued pursuant to Ct's inherent authority

St v Pinder
2018 WI 106
384 Wis. 2d 416
US v Jones
132 S. Ct. 945 (2012)

2) Constitutes a search for 4th Amendment purposes; application must be supported by probable cause, and a description of the object to be placed, the circumstances that led agents to wish to install it, and the length of time for which surveillance is requested

CR 7: INITIAL APPEARANCE

1. Probable Cause Finding Before Initial Appearance—*Riverside* Review

Gerstein v Pugh
95 S. Ct. 854 (1975)

A. Fourth Amendment requires a prompt judicial determination of probable cause as prerequisite to extended pretrial detention

Cty of Riverside
v McLaughlin
111 S. Ct. 1661 (1991)

B. For Def arrested without warrant, probable cause finding must be made by Judge or Ct Comm'r no later than 48 hours after arrest (weekends and holidays included)

1) Unreasonable delay may be established, even when finding made in less than 48 hours, if delay for purpose of gathering additional evidence to justify arrest, delay motivated by ill will, or delay for delay's sake

St v Harris
174 Wis. 2d 367
(Ct. App. 1993)
St v McKinney
168 Wis. 2d 349
(Ct. App. 1992)

C. 48-hour rule does not apply if probation/parole hold in effect or if already in lawful custody on an unrelated matter

St v Golden
185 Wis. 2d 763
(Ct. App. 1994)

D. Motion to dismiss should not be granted on event of non-prejudicial *Riverside* violation

E. Probable cause determination does not involve any adversarial rights and can be based entirely on hearsay and written testimony

St v Koch
175 Wis. 2d 684, 698
(1993)

F. Def has no right to be present when judicial officer makes probable cause determination

Recommendation

G. Consider it the same as an application for a warrant

2. Conducting the Initial Appearance

§ 970.01(1)

A. Shall be conducted "within a reasonable time" after arrest

St v Koch
175 Wis. 2d 684 (1993)

1) Requirement to conduct initial appearance within "reasonable time" is different than requirement to review probable cause within 48 hours after Def being taken into custody

St v Harris
174 Wis. 2d 367
(Ct. App. 1993)

a. Delay in initial appearance is never unreasonable if Def already in lawful custody of State

§ 970.01(2)

B. If person arrested without warrant and brought before Judge, complaint filed forthwith

§ 970.01(1)

C. Def may waive physical appearance and request that initial appearance be conducted on the record by telephone or live AV means

1) Def may authorize Atty to act and may be excused from attendance at initial appearance and arraignment with leave of Ct

St v Krause
161 Wis. 2d 919
(Ct. App. 1991)

2) CAUTION: Def's absence does not relieve Ct of ensuring that record reflects that Def has all information and all understanding necessary to meet constitutional standards

§ 968.03(1)

D. Review factual portion of complaint to determine probable cause that the Def has committed the charged

offense(s)

§ 970.02(1)(a)

E. Inform Def of charge(s)

§ 971.05(3)
§ 970.02(1)(a)

F. Give Def copy of complaint

1) Offer reading of charging paragraphs of misdemeanor complaint. May be waived by defendant

§ 970.02(1)(a)
St v Thompson
2012 WI 90
342 Wis. 2d 674

G. Advise as to penalties if felony—Ct's failure to do so may be harmless error if no prejudice to Def

§ 970.02(1)(b), (6)
St ex rel Winnie v Harris
75 Wis. 2d 547 (1977)

H. Inform Def of right to counsel and, if offense punishable by incarceration, at public expense, if eligible

"Because this charge carries with it the possibility of jail time, you have the right to be represented by an Atty. If you cannot afford to hire your own Atty, you have the right to have an Atty appointed to represent you at the public's expense"

1) If Def indicates desire to obtain counsel, may adjourn initial appearance

Recommendation

If initial appearance not adjourned, Ct should extend time limits for substitution requests and filing motions

§ 970.02(6)

2) If Def claims or appears to be indigent, refer to State Public Defender (SPD) for indigency determination under § 977.07(1)

St v Dean
163 Wis. 2d 503
(Ct. App. 1991)

3) If Def found not indigent by SPD, but still claims cannot afford counsel

§ 977.06(4)(a)

a. Conduct review of correctness of SPD application of administrative rules for appointment of counsel, if requested, or

St v Dean
163 Wis. 2d 503
(Ct. App. 1991)

b. Review Def's finances and determine whether Def indigent for appointment of counsel at Cty's expense

c. May set over initial appearance/arraignment, if necessary for appointment of counsel

§ 971.05(3)

I. If misdemeanor charges, ask Def how Def pleads to charge in complaint ("instant arraignment")

§ 971.06(2)

1) Enter plea of not guilty if Def stands mute

§ 970.02(2)

J. Set bail/bond and conditions of release pursuant to Ch 969. See CR 8 (Bail/Bond/Conditions of Release)

§ 165.83(2)(a)
§ 970.02(7)

K. If not already obtained by police, direct that fingerprints, photographs, and other identifying data be obtained if Def charged with

1) A felony

2) A misdemeanor or ordinance violation involving

a. Burglary tools

b. Commercial gambling

c. Dealing in gambling devices

d. Contributing to the delinquency of a child

e. Dealing in stolen property

f. Controlled substances or controlled substance analogs

g. Firearms

h. Dangerous weapons

i. Explosives

j. Pandering

k. Prostitution

l. Sex offenses where children are victims

m. Worthless checks

n. Disorderly conduct, if related to an act connected with one of the above

3) Being a fugitive from justice

§ 165.83(2)(a)5.
Wis DOJ CIB
Identification Manual

4) Other offenses designated by AG

a. Stalking

b. Harassment

§ 970.02(8)

L. If Def charged with violent crime under § 165.84(7)(ab), determine whether DNA was taken

Note

List of violent crimes found at end of chapter

1) If not, direct law enforcement agency or tribal law enforcement agency to obtain and submit DNA to State Crime Labs

2) Inform Def of right to request expungement of DNA sample under § 165.77(4)

State v. Lee
2021 WI App 12
396 Wis. 2d 136

3) Time limits may be waived by stipulation or upon good cause

§ 970.02(1)(c)

M. If felony, Def entitled to prelim

N. Schedule prelim

§ 970.03(2)

1) Within 10 days, if Def in custody and bail more than $500

2) Within 20 days, if Def released from custody or bail is $500 or less

3. DNA at Arrest Violations

CAUTION: This list is different than the list of violent crimes for the purposes of bail under § 969.001(3).

Per § 165.84(7)(ab)1. and § 165.84(7)(ab)4.—Felony violation of or solicitation, attempt, or conspiracy to commit the following felonies:

Statute	Violation
§ 940.01	1st-Degree Intentional Homicide
§ 940.05	2nd-Degree Intentional Homicide
§ 940.21	Mayhem
§ 940.225(1), (2) , or (3)	1st-, 2nd-, 3rd-Degree Sexual Assault
§ 940.235	Strangulation and Suffocation
§ 940.30	False Imprisonment
§ 940.302(2)	Human Trafficking
§ 940.305	Taking Hostages
§ 940.31	Kidnapping
§ 940.32(2), (2e), or (2m)	Stalking
§ 940.43	Intimidation of Witness
§ 940.45	Intimidation of Victim
§ 941.20	Endangering Safety by Use of Dangerous Weapon
§ 941.21	Disarming a Peace Officer
§ 941.327	Tampering with Household Products
§ 943.02	Arson
§ 943.06	Molotov Cocktails
§ 943.10	Burglary
§ 943.23(2)	Operating a Motor Vehicle Without Owner's Consent
§ 943.231(1)	Armed Carjacking
§ 943.32	Robbery
§ 948.02(1) or (2)	1st-, 2nd-Degree Sexual Assault of a Child
§ 948.025	Repeated Sexual Assault of a Child
§ 948.03(2)(a) or (c) or (5)(a)1., 2., 3, or 4. (but not § 948.03(2)(b))	Intentional Physical Abuse of a Child or Repeated Acts of Physical Abuse of a Child
§ 948.05	Sexual Exploitation of a Child
§ 948.051	Trafficking a Child
§ 948.055	Causing Child to View/Listen to Sexual Activity
§ 948.07	Child Enticement
§ 948.08	Soliciting Child for Prostitution
§ 948.085	Sexual Assault of Child in Substitute Care
§ 948.095	Sexual Assault of Child by School Staff, etc.
§ 948.30(2)	Abduction of Child by Force

Per § 165.84(7)(ab)2.—Felony violation of the following:

Statute	Violation
§ 940.02	1st-Degree Reckless Homicide
§ 940.03	Felony Murder
§ 940.06	2nd-Degree Reckless Homicide
§ 940.07	Homicide by Negligent Control of Animal
§ 940.08	Homicide by Negligent Operation or Handling of Weapon, Explosives, or Fire

§ 940.09(1c)	Homicide by Intoxicated Use of Motor Vehicle or Firearm
§ 940.10	Homicide by Negligent Operation of Motor Vehicle
§ 940.19(2), (4), (5), or (6)	Battery
§ 940.195(2), (4), (5), or (6)	Battery to Unborn Child
§ 940.20	Battery with Special Circumstances
§ 940.201(2)	Battery or Threat to Witness
§ 940.203(2)	Battery or Threat to Judge
§ 940.204	Battery or Threat to Health Care Providers and Staff
§ 940.205(2)	Battery to Department of Revenue Employee
§ 940.207(2)	Battery to DSPS or DWD Employee
§ 940.208	Battery to Certain Municipal Employees
§ 940.23	Reckless Injury
§ 941.30	Recklessly Endangering Safety
§ 948.03(3) or (5)(a)4.	Reckless Causation of Bodily Harm

Per § 165.84(7)(ab)3., any felony if a penalty enhancer in § 939.621 (domestic abuse repeater) could be imposed.

CR 8: BAIL/BOND/CONDITIONS OF RELEASE

§ 757.69(1)(b) For the purposes of this chapter, all references to Judge also include Ct Comm'rs.

1. Setting Bail/Bond

§ 969.001(1)
§ 967.02(1d)
St v Iglesias
185 Wis. 2d 117 (1994)
Rohl v St
90 Wis. 2d 18
(Ct. App. 1979)

A. Bail: Monetary condition of release designed to ensure Def will appear as required and will comply with bond conditions

§ 967.02(1h)

B. Bond: Undertaking by which Def agrees to comply with conditions of release

C. Hearing

§ 969.08(8)

1) Information offered need not conform to rules of evidence

a. Except for revocation of bail before conviction

b. See **Revocation of Bail for Commission of Serious Crime and Revocation of Bail for Victim/Witness Intimidation**, **Secs. 3** and **4**, *infra*

2) Ask both Def's and DA's recommendation for bail

Wis Const art I, § 9m

3) Upon request, victims entitled to make recommendation

§ 969.01(1)
65 OAG 102 (1976)

4) Bail/bond may be set before filing of complaint

D. Options

§ 969.02(1)
§ 969.03(1)

1) Release Def without bail

§ 969.02(1)
§ 969.03(1)

2) Permit execution of unsecured appearance (personal recognizance) bond with conditions

§ 969.02(2)
§ 969.03(1)

3) Require execution of secured appearance bond with solvent sureties

§ 969.02(2)
§ 969.03(1)

4) Require execution of secured appearance bond with cash deposit

§ 969.02(6)
§ 969.03(4)
§ 969.13(5)

a. If cash deposit in lieu of sureties required, person making cash deposit must be given written notice that, upon conviction, deposit will be applied to restitution and any fines, costs, or fees

St v Iglesias
185 Wis. 2d 117, 130–31
(1994)

- However, money posted for bail, irrespective of its source, is conclusively presumed to be the Def's money

St v Gassen
143 Wis. 2d 761
(Ct. App. 1988)

b. Ct not required to accept sufficient solvent sureties in lieu of cash

§ 969.02(8)

c. In a misdemeanor case, must not exceed maximum fine for offense

E. Standards for Setting Bail (if not charged with Violent Crimes under § 969.001(3))

§ 969.01(1)(b)1.

1) Bail may be imposed upon specific finding that there is reasonable basis to believe bail necessary to ensure Def's appearance in Ct

§ 969.01(4)

a. Shall be only in amount found necessary to do so

F. Standards for Setting Bail (if charged with Violent Crimes under § 969.001(3))

See Chart in **Sec. 9**, *infra*

§ 969.01(1)(b)2.

1) Bail may be imposed upon a finding that it is necessary based on the totality of the circumstances

2) Factors include, but are not limited to:

a. Previous convictions for a violent crime

b. Probability that Def will fail to appear in Ct

c. Need to protect members of community from serious harm

d. Need to prevent intimidation of witnesses

e. Consideration of any potential affirmative defenses

§ 969.01(4)

3) Bail may not be excessive

G. Other Considerations in Setting Bond/Bail

§ 969.01(4)

1) Statutory considerations for releasing Def without bail, fixing reasonable bail, or imposing other reasonable conditions of release

a. Ability to give bail

b. Nature, number, gravity of alleged offense(s)

c. Potential penalties Def faces

d. Degree of violence involved

e. Prior criminal record

f. Character and reputation

g. Health

h. Residence

i. Character and strength of evidence presented

j. Probationary, parole, or extended supervision status

k. Bail status in other pending cases, including other release conditions

l. Whether Def bound over after prelim

m. Past forfeitures of bail or non-appearances

n. Violations of prior conditions of release

o. Fugitive status at time of arrest

p. Policy against unnecessary detention pending trial

2) Traditional ties to community

a. Family ties

- Marriage
- Relatives in community

b. Employment

- Present—time of arrest
- Former—within past 3 years
- Other means of support

c. Residence—present, past 5 years, birthplace

d. Financial stake in community

- Ownership of property
- Business interest
- Amount and nature of indebtedness
- Savings

H. Conditions of Release

1) Required statutory conditions; person released on bail/bond shall

§ 969.02(4)
§ 969.03(2)

a. Not commit any crime

§ 969.02(4m)
§ 969.03(2m)
§ 940.49

b. Not intimidate victims or witnesses, nor cause or permit intimidation to be done on Def's behalf

§ 969.09(1)

c. Appear as Ct directs and submit to the orders and process of Ct

§ 969.10

d. Give written notice to the clerk of any change of address within 48 hours

§ 969.01(1)(a)
§ 969.01(4)
§ 969.02(3)(d)
§ 969.03(1)(e)

2) In addition to or in lieu of cash bail, as part of a bond, Judge may set nonmonetary conditions of release designed to

a. Protect public from serious harm, defined as:

§ 969.001(2m)

- Personal physical pain or injury, illness, impairment of physical condition, or death, including mental anguish or emotional harm attendant to pain or injury, illness, or death
- Damage to property over $2,500 in value
- Economic loss over $2,500 in value

b. Prevent intimidation of witnesses

c. Ensure Def's next Ct appearance

3) As conditions of bond, Judge may:

§ 969.02(3)(a)
§ 969.03(1)(a)

a. Give custody to designated individual or organization who agrees to supervise Def

§ 969.02(3)(b)
§ 969.03(1)(b)

b. Put restrictions on travel, associations, or place of abode

§ 969.02(3)(c)
§ 969.03(1)(c)

c. Prohibit possession of any dangerous weapon

§ 969.02(3)(d)
§ 969.03(1)(e)

d. Require return to custody after certain hours without charge for maintenance

§ 969.08(1)

- Def entitled to judicial review of this condition upon application; if not then released, Judge must set forth reasons for condition on the record

St ex rel Jacobus v St
208 Wis. 2d 39 (1997)

e. Prohibit consumption of alcohol

St v Taylor
226 Wis. 2d 490, 501
(Ct. App. 1999)

f. Prohibit consumption of illegal drugs

§ 969.02(3)(e)

g. If Def charged with violation of restraining order or injunction, may require Def to participate in mental health treatment, a batterer's intervention program, or individual counseling

§ 969.02(3)(d)
§ 969.03(1)(e)

h. Impose any other reasonable conditions designed to accomplish the above goals

St v Braun
152 Wis. 2d 500
(Ct. App. 1989)

4) Conditions of bail infringing Def's 1st Amendment rights require specific findings that condition necessary

St v Wilcenski
2013 WI App 21
346 Wis. 2d 145

5) Ct may not impose "blanket" conditions of release. Must consider Def's individual circumstances

St v Wilcenski
2013 WI App 21
346 Wis. 2d 145

6) Ordering treatment and monitoring of treatment does not violate Def's rights to privacy and freedom from unreasonable searches

§ 971.10(4)

7) May be continued even if speedy trial demand is violated

I. When conditions of bond can be enforced

St v Jacobs
2023 WI App 53
___ Wis. 2d ___
St v Orlik
226 Wis. 2d 527
(Ct. App. 1999)

1) Bail/bond statutes do not authorize enforcement of conditions of bond for a case when a Def is incarcerated or reincarcerated on that case

St v Dewitt
2008 WI App 134
313 Wis. 2d 794

a. Bond conditions operative only when Def posts any required bail and signs/undertakes bond

St v Wilcenski
2013 WI App 21
346 Wis. 2d 145
St v Dewitt
2008 WI App 134
313 Wis. 2d 794
RMC Form CR-203

b. Def not required to sign bond, but will remain in custody until Def does so

St v Dewitt
2008 WI App 134
313 Wis. 2d 794

c. Conditions operative if Def posts any required bail and signs bond, but remains in custody on other matters

J. Additional orders

§ 940.47

1) Separate orders prohibiting contact or keeping certain distance can be entered upon finding that knowing and malicious prevention or dissuasion has or is reasonably likely to occur, and may be enforced by contempt

St v Orlik
226 Wis. 2d 527, 539–40
(Ct. App. 1999)

2) Orders apply regardless of custody status

2. Reviewing Bail

§ 969.08(1)

A. Same statutory and traditional considerations as above

§ 969.08(2)

B. Ct may consider violations of conditions of release as grounds to set or increase bail or modify conditions

§ 969.08(1)

C. Upon petition of either State or Def

§ 969.08(1)

1) If not able to meet conditions of bail, Def entitled to review of conditions if in custody 72 hours after initial appearance

§ 969.08(1)

2) If not then released, Judge must set forth on record reasons for requiring continuation of conditions

§ 969.08(3), (4)

D. Reasonable notice of review must be given to opposing party

§ 969.08(5)

3. Revocation of Bail for Commission of Serious Crime

§ 969.08(5)(a)

A. Written petition from DA required, alleging

§ 969.08(5)(a)1.

1) Def on bail for "serious crime" under § 969.08(10)(b)

§ 969.08(5)(a)2.

2) Def committed another "serious crime" while on bail

§ 969.08(5)(a)3.

Copy of criminal complaint for new charge must be provided

§ 969.08(5)(b)1.

B. Upon petition, Ct may issue warrant to bring Def before Ct

§ 969.08(5)(b)

C. Revocation hearing

§ 969.08(5)(b)1.

1) Def given equivalent of initial appearance under § 970.02(1) and (6)

§ 969.08(5)(a), (b)1.

2) Def given copy of written petition of DA asking for revocation of bail

§ 969.08(5)(b)1.

3) Def can be held up to 7 days without bail

§ 969.08(5)(b)1.

4) Combined bail revocation hearing and prelim on new charge held before Ct

§ 969.08(5)(b)2., 3.

5) State must prove by clear and convincing evidence that new crime by Def occurred while Def on bail

§ 969.08(5)(b)2.

6) Rules of evidence apply

§ 969.08(5)(b)1.

7) Separate findings required regarding bail revocation and prelim on new charge

§ 969.08(5)(b)3., 4.

8) Upon finding that State carried its burden, Ct may revoke bail and hold Def for trial for up to 60 days without bail

Otherwise Def must be released on bail on appropriate conditions set by Ct

4. Revocation of Bail for Victim/Witness Intimidation

§ 940.48(3)
§ 940.49

A. After hearing and upon substantial evidence of intimidation, any form of pretrial released can be revoked and/or bail forfeited

B. Applies whether Def acted personally or behavior was caused or encouraged by Def

§ 969.13

5. Forfeiture of Bail

§ 969.13(1)

A. Bail shall be forfeited if conditions of bond not complied with

RMC Form CR-230
§ 969.13(1)

B. By entry of order declaring bail forfeited

§ 969.13(2)

1) Order may be set aside upon conditions Ct imposes if justice does not require enforcement of forfeiture

§ 969.13(3)

2) Clerk is agent for receipt of papers affecting Def's and surety's bond liability

§ 969.13(3)

3) No independent action required

§ 969.13(4)

4) Notice of order of forfeiture mailed to Def and surety

§ 969.13(4)
St v Achterberg
201 Wis. 2d 291 (1996)

C. Upon motion of DA, or sua sponte if justice so requires, Ct must enter judgment for State for amount of bond if Def does not surrender

Provided surety or Def does not satisfy Ct within 30 days that failure to appear impossible and without Def's fault

Melone v St
2001 WI App 13
240 Wis. 2d 451
St v Ascencio
92 Wis. 2d 822
(Ct. App. 1979)

D. While forfeiture is mandatory upon a violation of a condition of bond, decision to set aside forfeiture is subject to Ct's discretion

§ 969.14

E. Sureties may be discharged from bond obligations if

1) Arrest Def and deliver to sheriff

2) Deliver to sheriff certified copy of warrant and order admitting Def to bail

3) After completing 1) and 2), sureties apply to Ct for order discharging them from liability

§ 969.13(5)(a)

F. Forfeited cash bail to be applied FIRST to pay recompense to victim

§ 969.13(5)(b)

1) Ct must determine amount of recompense for victim, unless substantial reasons not to do so are stated on the record

§ 969.13(5)(b)

2) Ct must determine recompense in the same manner as it would determine restitution

6. Denial of Bail (Preventative Detention)

§ 969.035(2)

A. Ct may deny release to

1) Person accused of committing an offense under §§ 940.01, 940.225(1), 948.02(1) or (2), 948.025, or 948.085

2) Person accused of committing or attempting to commit violent crime and person has previous conviction for committing or attempting to commit a violent crime

§ 969.035(1)(b)

a. Violent crime is defined as any crime specified in §§ 940.01, 940.02, 940.03, 940.05, 940.06, 940.07, 940.10, 940.19(5), 940.195(5), 940.198 (2)(a) or (c), 940.21, 940.225(1), 940.23, 941.327, 948.02(1) or (2), 948.025, 948.03, or 948.085

Caution

NOTE: This definition of violent crime is different than the definition used to establish the grounds for setting cash bail.

§ 969.035(3)

B. Prehearing procedure

1) DA must

a. Allege Def eligible for denial of release under **Sec. 6.A.** above

b. Provide copy of complaint charging commission or attempted commission of present offense specified in **Sec. 6.A.** above

c. Allege that available conditions of release will not adequately protect community or prevent intimidation of witnesses

§ 969.035(4)

2) If Ct determines DA has complied, Ct may order detention of person in custody continued

Ct must give Def copy of documents provided by DA and inform of rights under §§ 969.035 and 970.02(1) and (6)

C. Pretrial detention hearing

§ 969.035(5)

1) Purpose: To determine whether continued detention of Def justified

2) May be held in conjunction with prelim or conditional release revocation hearing

Separate findings must be made relating to prelim, conditional release, and pretrial detention

3) Must be commenced within 10 days from date Def detained

§ 969.035(9)

Delay caused by Def not included within 10-day time limit

§ 969.035(6)

4) Burden on State to prove by clear and convincing evidence that

a. Def committed offense specified in **Sec. 6.A.** above

b. Available conditions of release will not adequately protect community or prevent intimidation of witnesses

5) Rules of evidence apply

6) Rights of confrontation, to call witnesses, to cross-examination, and to counsel apply

§ 969.035(7), (8)

D. Findings

1) If burden not met and Def otherwise eligible, Ct must release Def

May impose conditions

2) If burden met, Ct may deny release to Def for additional period not to exceed 60 days after hearing

After 60 days, Def must be released

a. May impose conditions

§ 969.035(9)

b. Delay caused by Def not included in 60-day time limit

§ 969.035(10)

E. Def may petition for release in accordance with § 969.03 at any time

§ 969.035(11)

F. Ct must place case of detained Def on expedited trial calendar

7. Bail After Conviction

A. When release available

§ 969.01(2)(a)

1) Release allowed in Ct's discretion after conviction and before sentencing

Except may not release if 3rd or subsequent OWI conviction

§ 969.01(2)(b), (c)
St v Whitty
86 Wis. 2d 380, 388
(1978)

2) Release may be allowed in Trial Ct's discretion pending appeal after sentencing

St v Barnes
127 Wis. 2d 34
(Ct. App. 1985)

a. Monetary condition may be imposed

St v Taylor
205 Wis. 2d 664
(Ct. App. 1996)
St v Lipke
186 Wis. 2d 358
(Ct. App. 1994)

b. But misuse of discretion to impose cash bail if Def is indigent and no risk of future nonappearance

§ 969.01(2)(e)

3) Any Ct, Judge, or Justice authorized to grant bail after conviction may revoke order granting bail

B. Bail not available

St ex rel Shock v DHSS
77 Wis. 2d 362 (1977)

1) Bail not to be granted to probationer pending review of revocation

May be granted on underlying charge pending in Trial Ct

St v Shumate
107 Wis. 2d 460 (1982)

2) No authority to grant bail pending federal habeas corpus review

St v Braun
100 Wis. 2d 77, 85 (1981)

3) Bail not to be granted after sentencing merely for Def's personal accommodation

§ 809.31

C. Procedure for release on bail pending postconviction relief

§ 809.31(1)

1) Def must file motion in Trial Ct

§ 809.31(2)

2) Ct promptly holds hearing, determines motion, and states grounds for decision

§ 809.31(3)

3) Release may be granted if

§ 809.31(3)(a)

a. No substantial risk Def will not appear following conclusion of postconviction proceedings

§ 809.31(3)(b)

b. Def not likely to commit serious crime, intimidate witnesses, or interfere with administration of justice

§ 809.31(3)(c)

c. Def promptly prosecutes postconviction proceedings, and

§ 809.31(3)(d)

d. Postconviction proceedings not taken for purpose of delay

§ 809.31(4)

4) In determining motion, Ct must consider nature of crime, length of sentence, and other factors relevant to pretrial release

§ 809.31(6)

5) Ct must require Def to post bond in Trial Ct in accordance with § 969.09, and

6) Ct may impose terms and conditions

8. Disbursement of Bail After Conviction

§ 969.02(6)
§ 969.03(4)

A. Cash bail must be applied FIRST to pay restitution to victim; remainder then is applied toward costs and fines

St v Jones
2021 WI App 15
396 Wis. 2d 602

B. If case dismissed, even if read in, cash bail must be returned and may not be applied to restitution, costs, and fines imposed in other cases

9. List of Violent Crimes for Purposes of Bail Under § 969.001(3)

Statute	Violation
§ 940.01 or 940.02	First-degree intentional homicide or first-degree reckless homicide
§ 940.03	Felony murder
§ 940.05 or 940.06	Second-degree intentional homicide or second-degree reckless homicide
§ 940.07	Homicide resulting from negligent control of vicious animal
§ 940.08	Homicide by negligent handling of dangerous weapon, explosives or fire
§ 940.09(1)	Homicide by intoxicated use of vehicle
§ 940.10	Homicide by negligent operation of vehicle
§ 940.11	Mutilating or hiding a corpse
§ 940.12	Assisting suicide
§ 940.19(1), (2), (4), (5), or (6)	Battery; substantial battery; aggravated battery
§ 940.195 (1), (2), (4), (5), or (6)	Battery to an unborn child; substantial battery to an unborn child; aggravated battery to an unborn child
§ 940.198(2) or (3)	Physical abuse of an elder person (intentional or reckless)
§ 940.20	Battery: special circumstances (by prisoner, etc.)
§ 940.201(2)	Battery or threat to witnesses
§ 940.203(2)	Battery or threat to an officer of the court or law enforcement officer
§ 940.204	Battery or threat to health care providers and staff
§ 940.205(2)	Battery or threat to department of revenue employee
§ 940.207(2)	Battery or threat to department of safety and professional services or department of workforce development employee
§ 940.208	Battery to certain employees of counties, cities, villages, or towns
§ 940.21	Mayhem
§ 940.225(1), (2), or (3)	First-, second-, or third-degree sexual assault
§ 940.23	Reckless injury
§ 940.235	Strangulation and suffocation
§ 940.24	Injury by negligent handling of dangerous weapon, explosives, or fire
§ 940.25	Injury by intoxicated use of a vehicle
§ 940.285	Abuse of individuals at risk
§ 940.29	Abuse of residents of penal facilities
§ 940.30	False imprisonment
§ 940.302(2)	Human trafficking
§ 940.305	Taking hostages
§ 940.31	Kidnapping
§ 940.32	Stalking
§ 940.43	Intimidation of witnesses
§ 940.45	Intimidation of victims
§ 941.20	Endangering safety by use of dangerous weapon
§ 941.21	Disarming a peace officer
§ 941.28	Possession of short-barreled shotgun or short-barreled rifle
§ 941.2905	Straw purchasing of firearms
§ 941.292	Possession of a weaponized drone
§ 941.30	Recklessly endangering safety
§ 941.327	Tampering with household products
§ 941.38(2) or (3)	Criminal gang member solicitation or contact
§ 941.39	Victim, witness, or co-actor contact
§ 943.01(2)(c)	Damage to property of grand or petit juror
§ 943.011	Damage or threat to property of witness

Statute	Violation
§ 943.013	Criminal damage; threat; property of judge
§ 943.02	Arson of buildings; damage of property by explosives
§ 943.04	Arson with intent to defraud
§ 943.06	Molotov cocktails
§ 943.10	Burglary
§ 943.231(1) or (2)	Carjacking
§ 943.30	Threats to injure or accuse of crime
§ 943.32	Robbery
§ 943.87	Robbery of a financial institution
§ 946.43	Assaults by prisoners
§ 947.013	Harassment
§ 947.015	Bomb scares
§ 948.02(1) or (2)	First- or second-degree sexual assault of a child
§ 948.025	Repeated acts of sexual assault of the same child
§ 948.03(2), (3), or (5)	Physical abuse of a child
§ 948.04	Causing mental harm to a child
§ 948.05	Sexual exploitation of a child
§ 948.051	Child trafficking
§ 948.055	Causing a child to view or listen to sexual activity
§ 948.06	Incest with a child
§ 948.07	Child enticement
§ 948.08	Soliciting a child for prostitution
§ 948.085	Sexual assault of a child placed in substitute care
§ 948.095	Sexual assault of a child by a school staff person or a person who works or volunteers with children
§ 948.30(2)	Abduction of another's child
§ 948.55	Leaving or storing a loaded firearm within the reach or easy access of a child
§ 951.02	Mistreating animals
§ 951.08	Instigating fights between animals
§ 951.09	Shooting at caged or staked animals
§ 941.26 (felony violation)	Machine guns and other weapons; use in certain cases
§ 813.12, 813.122, or 813.125	Domestic abuse restraining orders and injunctions, child abuse restraining orders and injunctions, or restraining orders and injunctions for individuals at risk
§ 939.30, 939.31, or 939.32	Solicitation, conspiracy, or attempt to commit a Class A felony
§ 939.621 or 939.63(1)	Violation to which a penalty enhancer may be applied for certain domestic abuse offenses or for use of a dangerous weapon

CR 9: PRELIM/ARRAIGNMENT

PRELIMINARY EXAMINATION

1. Nature of Preliminary Examination

§ 970.03(1)
St v Webb
160 Wis. 2d 622
(1991)

A. Purpose

St v Richer
174 Wis. 2d 231
(1993)

1) Summary proceeding to determine whether probable cause to believe felony committed by Def

   a. Determine whether Def should be subjected to criminal prosecution and further deprived of liberty

   b. Prevent hasty, malicious, improvident, and oppressive prosecutions

   c. Protect Def from open and public accusations of the crime

   d. Avoid, for Def and public, expense of a trial

   e. Save Def from humiliation and anxiety involved in public prosecution

   f. Discover whether there are substantial grounds for prosecution

2) For Juv subject to original jurisdiction in adult Ct, *see* **CR 51**

St v Berby
81 Wis. 2d 677,
683 (1978)

B. Standard

1) Probable cause for bindover of Def at prelim is greater than probable cause for issuance of arrest warrant

St v Knoblock
44 Wis. 2d 130,
134 (1969)

   a. Guilt beyond a reasonable doubt need not be proved

St v Dunn
121 Wis. 2d 389 (1984)
St v Schaab
2000 WI App 204
238 Wis. 2d 598

   b. If conflicting inferences are equally plausible from undisputed facts, bindover required

2) Plausibility of story, not credibility of witnesses, is standard

St v Wolverton
193 Wis. 2d 234
(1995)
St v Richer
174 Wis. 2d 231,
243 (1993)
St v Watkins

40 Wis. 2d 398,
401 (1968)

C. Right to prelim is statutory but implicates certain constitutional rights

St v Richer
174 Wis. 2d 231, 242
(1993)
St v Neudorff
170 Wis. 2d 608, 617
(Ct. App. 1992)

1) Proceeding must be adequate to fulfill Def's constitutional right to know nature and cause of charges that must be defended against

St ex rel Lynch v
Circuit Ct for Dane Cty
82 Wis. 2d 454 (1978)

2) Prelim not discovery device, and Def has no right to exculpatory evidence or inspection of prosecutor's files

St v Schaefer
2008 WI 25
308 Wis. 2d 279

a. Def cannot compel production of police reports before, or at, preliminary examination by subpoena duces tecum

§ 971.31(5)(b)

3) Motions to suppress evidence obtained by search warrant not available

D. Prelim not required when

§ 970.02(1)(c)
St v C&S Mgmt Co
198 Wis. 2d 844, 847
(Ct. App. 1995)

1) Def is corporation or LLC

§ 970.03(1), § 970.02(1)(c)

2) Def is charged with a misdemeanor

§ 970.02(1)(c), (4)

3) Def waives right to prelim

a. In writing, or

b. In open Ct

2. Waiver

A. Advise Def of rights and benefits of prelim

B. See Wis JI-Cr SM-31 for suggested colloquy

Wis JI-Cr SM-31

C. Finding of waiver

"The Ct finds that the Def's waiver is knowing and voluntary"

D. Actions of Ct after waiver

§ 970.02(4)

1) Bind Def over to Trial Ct for arraignment and further proceedings

2) Continue Def's bail or admit Def to bail under Ch 969

3. Time Limitations

A. Prelim must be commenced

§ 970.03(2)

1) Within 20 days after initial appearance if Def released from custody or bail is set at $500 or less

§ 970.03(2)

2) Within 10 days if Def in custody AND bail fixed in excess of $500

§ 970.03(2)

3) Time may be extended on stipulation of parties or on motion for cause

St v Selders
163 Wis. 2d 607
(Ct. App. 1991)

4) Whether to adjourn for cause is within Trial Ct's discretion, after considering

a. Justification for adjournment

b. Possible prejudice to opposing party

c. Public interest

- Convenience of witnesses
- Convenience of administration of justice
- Rights of victim

St v Lee
2021 WI App 12, ¶ 58
396 Wis. 2d 136

d. If based on delays in SPD appointment of counsel, cost and ability to appoint counsel at Cty expense; whether Def remains in custody (and, if so, the liberty interests affected by and costs of remaining in custody); whether Def will be subject to further evidence-gathering while incarcerated; and whether delay could compromise defense or result in lost evidence

St v Horton
151 Wis. 2d 250
(Ct. App. 1989)

5) Statutory time limits do not apply if case remitted to Trial Ct after interlocutory appeal

B. Violation of time limitations

Logan v St
43 Wis. 2d 128, 138
(1969)
St v Lee
2021 WI App 12
396 Wis. 2d 136

1) Violation of time limitations deprives Ct of personal jurisdiction over the charged case

Armstrong v St
55 Wis. 2d 282, 285
(1972)

Def may be recharged to regain personal jurisdiction because jeopardy has not yet attached

Godard v St
55 Wis. 2d 189, 190
(1972)

6) Def's failure to object to violation of time limitations waives loss of personal jurisdiction

St v Robles
157 Wis. 2d 55
(Ct. App. 1990)
aff'd, 162 Wis. 2d 883
(1991)

7) Def waives time defect by failing to bring in-custody status to Ct's attention when Ct relied on Def's representations regarding release

4. Procedure

A. In general

§ 971.04(1)(d)
§ 885.60

1) Def must be present personally or by telephone or audiovisual means

§ 906.15(2)(d)
§ 950.04(1v)(b)

2) Ct may not exclude victims from evidentiary proceeding unless it is necessary for fair proceeding

§ 970.03(5)

3) All witnesses sworn and transcript made

§ 970.03(13)

Testimony may be taken by telephone or by live AV means if proponent shows good cause or if testimony used to prove element of identity offense under § 943.201(2) or § 943.203(2)

§ 970.03(1)

4) May be held in conjunction with bail revocation hearing under § 969.08(5)(b), provided Ct makes separate findings relating to prelim and to bail revocation

§ 969.035(5)

5) May be held in conjunction with pretrial detention hearing, but separate findings required

St ex rel Stevens v Cir Ct
141 Wis. 2d 239 (1987)

6) Presumption that prelim open to public, even in sexual assault cases, notwithstanding § 970.03(4)

A qualified 6th Amendment right to a public trial applies to closure of prelim

St ex rel Stevens v Cir Ct
141 Wis. 2d 239 (1987)
St v Webb
154 Wis. 2d 320
(Ct. App. 1990)
rev'd on other grounds
160 Wis. 2d 622 (1991)

7) When request by complaining witness in sexual assault case to close prelim, follow these procedures

a. Party seeking closure must show overriding interest likely to be prejudiced by open hearing

b. Closure must be no broader than necessary to protect the overriding interest

c. Must consider reasonable alternative to closing proceeding

d. Ct must make finding adequate to support closure

Globe Newspaper Co
v Superior Ct
102 S. Ct. 2613 (1982)

e. Factors to consider

- Victim's age
- Victim's psychological maturity and understanding
- Nature of crime

- Desires of victim and victim's family

St v Wilkens
159 Wis. 2d 618
(Ct. App. 1990)

8) Counsel may make decision to assert or waive option of having prelim public or closed, especially when Def does not oppose counsel's decision

If no objection to closure, right to object waived

St v Oliver
161 Wis. 2d 140
(Ct. App. 1991)

B. Rules of evidence apply as at trial with exceptions

§ 970.038
St v O'Brien
2014 WI 54
354 Wis. 2d 753
St v Hull
2015 WI App 46
363 Wis. 2d 603

1) Hearsay admissible

§ 971.31(5)(b)

2) Objections to admissibility of statements of Def not available

§ 970.03(12)

3) Reports from the following to be received without calling expert who made findings

a. State Crime Lab

b. State Laboratory of Hygiene

c. FBI investigation laboratory

d. Hospital laboratory

e. Local health Dept

C. Def has right to

§ 971.31(5)(c)

1) Challenge sufficiency of complaint

Must be done before commencement of prelim, or deemed waived

Sparkman v St
27 Wis. 2d 92 (1965)

2) Counsel

§ 971.20(3)

3) Substitution of Judge or Ct Comm'r

NOTE: Substitution at prelim exhausts right to substitution for duration of case, even if used for substitution of Ct Comm'r.

§ 970.05

4) Transcript

§ 970.03(6)

5) Sequestration and exclusion of witnesses

§ 970.03(5)
St v McCarter
36 Wis. 2d 608 (1967)

6) Call witnesses on behalf of self

St v Schaefer
2008 WI 25, ¶¶ 32–40
308 Wis. 2d 279
St v O'Brien
2013 WI App 97
349 Wis. 2d 667, *aff'd*,
2014 WI 54
354 Wis. 2d 753

a. Cannot be called merely to discover State's case or demonstrate inconsistency in testimony of State's witness

St v Hull
2015 WI App 46, ¶ 33
363 Wis. 2d 603

b. Def may not call alleged victim unless the anticipated testimony is relevant to the issue of probable cause. Weight and credibility of the State's evidence is outside the scope of the prelim

7) Cross-examine State's witnesses

Vigil v St
76 Wis. 2d 133 (1977)

a. Attack on credibility should be directed towards plausibility of story, not general trustworthiness of witness

St v Wolverton
193 Wis. 2d 234 (1995)
St v McCarter
36 Wis. 2d 608 (1967)

b. Right not unrestricted

St v Knudson
51 Wis. 2d 270 (1971)

c. No right to fish for elements of State's case

§ 906.12

d. Right to examine materials used by State's witnesses to refresh recollection

St v Russo
101 Wis. 2d 206

(Ct. App. 1981)

e. May examine experts as to qualifications, textual sources, tests

§ 970.03(12)(b)

- No right to cross-examine expert whose reports admissible under special prelim rule of admissibility

D. Def does not have right to

St ex rel Funmaker v Klamm
106 Wis. 2d 624, 634
(1982)

1) Make closing argument

Decision to allow closing argument within sound discretion of Judge

2) Confront witnesses

St v Marshall
92 Wis. 2d 101 (1979)

3) Introduce impeachment evidence

St v Schaefer
2008 WI 25
308 Wis. 2d 279

4) Compel production of police reports before, or at, preliminary examination by subpoena duces tecum

E. Function of Ct—single and multiple related counts

St v Akins
198 Wis. 2d 495 (1996)

1) Determine whether Def probably committed a felony

St v Williams
198 Wis. 2d 516 (1996)

2) When two or more transactionally or factually related counts are charged and probable cause found in relation to one count, bindover required on all transactionally or factually related counts

Committee Comment

a. Ct determines whether a felony was probably committed in the context of the facts related to a count in the complaint, not whether State has shown probable cause for any specific count in the complaint

St v Akins
198 Wis. 2d 495 (1996)

3) Judge not to make finding nor engage in discussion as to precise felony on which Def bound over

970.03(10)
St v Williams
198 Wis. 2d 516 (1996)

4) Multiple-count complaint: Suggested three-step procedure

a. Read complaint to identify transactionally related counts

St v Richer
174 Wis. 2d 231 (1993)

- "Transactionally related" means charges related to each other from evidentiary or transactional viewpoint based upon evidence at prelim

— Need more than same elements and same Def

St v Williams
198 Wis. 2d 516 (1996)

— [Apparently] synonymous with "not wholly unrelated" and "common nucleus of facts"

St v Burke
153 Wis. 2d 445 (1990)

— Factors include same parties, witnesses, geographical proximity, time, physical evidence, motive, and intent

St v Richer
174 Wis. 2d 231 (1993)

— Above factors must be considered as components of broader test of transactional relationship. Counts may be transactionally related even if not all seven factors are satisfied, despite language in *Burke* (and *Williams*) that suggests all must be present

b. If probable cause to believe a felony was committed, bind Def over on all transactionally related counts

c. If no probable cause felony was committed in conjunction with a set of transactionally related counts, Ct must dismiss all such counts

- State may not recharge dismissed counts in information or charge additional counts arising from that common nucleus of facts

§ 906.11

5) Ct may suspend progress of State's case when it is of opinion that sufficient evidence introduced

a. Care must be taken not to deny Def's rights to cross-examine and call witnesses

b. When there is further evidence by defense, if persuasive to Ct, State may present added evidence in furtherance of its case

F. Function of Ct—multiple unrelated counts

St v Street
202 Wis. 2d 533
(Ct. App. 1996)

State must establish probable cause that Def committed a felony with respect to each transactionally distinct count in complaint

G. Probable cause

St v Olson
75 Wis. 2d 575 (1977)

1) Facts, together with any reasonable inferences, which lead reasonable person to conclude that a crime has probably been committed and that Def probably committed it

St v Sauceda
163 Wis. 2d 553
(Ct. App. 1991)
rev'd on other grounds
168 Wis. 2d 486 (1992)

2) Wis Cts follow "totality of circumstances" approach to evaluating probable cause

St v Sorenson
143 Wis. 2d 226 (1988)

3) Probable cause satisfied when there exists believable or plausible account of Def's commission of felony

St v Dunn
121 Wis. 2d 389 (1984)
St v Schaab
2000 WI App 204
238 Wis. 2d 598

a. Even if contrary but believable account also exists in record, Ct cannot weigh State's case against evidence favorable to Def

St ex rel Huser
v Rasmussen
84 Wis. 2d 600 (1978)

b. Not proper forum to debate and determine issue of credibility and weight of evidence once essential facts as to probability have been established

St v Lindholm
2000 WI App 225
239 Wis. 2d 167

4) Probable cause must be proved for prior convictions that change nature of charge from misdemeanor to felony

St v Fry
129 Wis. 2d 301
(Ct. App. 1985)

5) Def's uncorroborated confession sufficient to support finding of probable cause

St v Moats
156 Wis. 2d 74 (1990)

6) Bindover may be based solely on unconstitutionally obtained evidence

5. Conclusion of Hearing

§ 970.03(7)

A. Bind Def over for trial if probable cause to believe Def committed a felony

§ 970.03(8)

B. If probable only misdemeanor committed, amend complaint to conform to evidence

§ 970.03(9)
St v Sorenson

152 Wis. 2d 471
(Ct. App. 1989)

C. If no probable cause found for any crime, order dismissal without prejudice

§ 970.04
St v Johnson
231 Wis. 2d 58
(Ct. App. 1999)

Def may be recharged when DA has or discovers new evidence

6. Juveniles

Recommendation

See **CR 51—Reverse Waiver**

7. Review

St ex rel Dowe v
Waukesha Cty Cir Ct
184 Wis. 2d 724 (1994)
St v Gillespie
2005 WI App 35
278 Wis. 2d 630
St v Johnson
231 Wis. 2d 58
(Ct. App. 1999)

Bindover decision reviewable by motion to dismiss. De novo review is not available

8. Errors

St v Webb
160 Wis. 2d 622 (1991)

Any error at preliminary hearing is cured by errorless trial

ARRAIGNMENT

1. Information Filed

§ 971.01(2)
St v Phillips
2000 WI App 184
238 Wis. 2d 279

A. Information must be filed within 30 days after decision to bind over

1) Motion may be made to extend time

2) Failure to timely file—dismissed without prejudice

St v White
2008 WI App 96

312 Wis. 2d 799
St v Bury
2001 WI App 37
241 Wis. 2d 261

B. Information may allege additional charges, not heard at prelim, so long as "transactionally related"

1) "Transactionally related" is synonymous with "not wholly unrelated"

2) Transactionally related charge may be added to the information, even if Def not allowed cross-examination on that charge at the prelim

St v Cotton
2003 WI App 154
266 Wis. 2d 308

C. Information alleging completely new charges (not containing any original charges) must be supported by sufficient evidence at prelim to show probable cause Def committed those new offenses

2. "Instant Arraignments"

Felonies: Arraignment may be in Trial Ct or Ct that conducted prelim or accepted waiver of prelim

3. Duties at Arraignment

§ 971.05

A. Arraignment must be in open Ct

§ 971.05(2), 970.02(6)

B. Inform unrepresented Def of right to counsel

§ 971.05(3)

C. Deliver copy and read information to Def, unless waived

D. Ask how Def pleads to charge

E. Enter plea of not guilty, if Def stands mute

F. Accept plea or schedule trial or other necessary hearings

§ 971.31(5)(a)

G. Set time for filing written motions

10 days in felony cases unless Ct orders otherwise

4. Presence of Defendant

§ 971.04(1)(a)

A. Felony cases

Def must be present at arraignment, either personally or by telephone or audiovisual means

§ 971.07

B. Co-Defs may be arraigned separately or together, in Ct's discretion

St v Kaye
106 Wis. 2d 1 (1982)
St v Kalk
2000 WI App 62
234 Wis. 2d 98
See Wis JI-Cr SM-45

Consider any apparent conflicts of interest for counsel representing more than 1 Def

CR 10: DISCOVERY AND INSPECTION

1. General

Wold v St
57 Wis. 2d 344 (1973)
St ex rel Johnson v Waukesha Cty Ct
41 Wis. 2d 188, 192 (1968)

A. Wisconsin recognized no "clear legal right" to pretrial discovery before 1970 Criminal Code

§ 971.23

B. Limited discovery and inspection now statutorily provided

St ex rel Lynch v Cty Ct
82 Wis. 2d 454 (1978)

1) Ct may not order general inspection of prosecution files before prelim

a. Inherently harmful to orderly administration of justice

St v Schaefer
2008 WI 25
308 Wis. 2d 279

b. Police reports cannot be compelled by subpoena duces tecum

Arizona v Youngblood
109 S. Ct. 333 (1988)

2) Prosecutor has no constitutional duty routinely to deliver entire file to defense counsel

Brady v Maryland
83 S. Ct. 1194 (1963)

C. Additional discovery required as matter of due process, when

1) Evidence favorable to accused

2) Evidence material to either guilt or punishment

Upjohn v US
101 S. Ct. 677 (1981)

D. Atty-client privilege and work-product doctrine limit State's discovery rights

2. Timing of Statutory Discovery Motions

§ 971.31(5)(b)

A. Felonies

§ 971.31(5)(b)

1) Motions for statutory discovery may not be made

a. At prelim

§ 971.31(5)(b)

b. Until an information filed

§ 971.31(5)(a)

2) Must be filed within 10 days after arraignment, unless Ct otherwise permits

§ 971.31(5)(a)

B. Misdemeanors

1) Must be filed within 10 days after initial appearance, unless Ct otherwise permits

3. Types of Statutory Discovery Provided

§ 971.23(1)
St v DeLao
2002 WI 49
252 Wis. 2d 289
Jones v St
69 Wis. 2d 337 (1975)

A. Duty of State to disclose within reasonable time before trial if within possession, custody, or control of DA or law enforcement

§ 971.23(1)(a)
Wold v St
57 Wis. 2d 344 (1973)

1) Any written or recorded statement of Def

§ 971.23(1)(b)
Kutchera v St
69 Wis. 2d 534 (1975)

2) Any written summaries of all oral statements of Def intended to be used in trial and names of witnesses to those statements

St v DeLao
2002 WI 49
252 Wis. 2d 289

a. Standard is objective, i.e., what reasonable prosecutor would plan to use

§ 971.23(1)(c)

3) Copy of Def's criminal record

§ 971.23(1)(d)
Lunde v St
85 Wis. 2d 80 (1978)
St v Sandoval
2009 WI App 61
318 Wis. 2d 126
Konkol v St
2002 WI App 174
256 Wis. 2d 725

4) List of all witnesses and their addresses, except those to be called for rebuttal or impeachment only

§ 971.23(1)(e)
St v Thomas
150 Wis. 2d 374 (1989)
St v Copening
100 Wis. 2d 700 (1981)

5) Any relevant written or recorded statements of a witness named under § 971.23(1)(d) and

a. Any audiovisual recording of oral statement of a child under § 908.08

b. Expert reports or summaries including

- Physical exams
- Mental exams
- Scientific tests or comparisons

§ 971.23(1)(f)
Jones v St
69 Wis. 2d 337 (1975)

6) Criminal record of prosecution witness known to State

§ 971.23(1)(g)

7) Any physical evidence DA intends to offer in evidence at trial

a. Duty of State to preserve specimens

California v Trombetta
104 S. Ct. 2528 (1984)
St v Pankow
144 Wis. 2d 23
(Ct. App. 1988)

- No duty to preserve samples, even if useful to Def, unless Def shows

  — Bad-faith destruction by State, and

  — Evidence had apparent exculpatory value before its destruction, and

  — No comparable evidence on same subject matter available to Def

Arizona v Youngblood
109 S. Ct. 333 (1988)
St v Greenwold
189 Wis. 2d 59
(Ct. App. 1994)

- Due process does not require State to preserve evidence merely potentially exculpatory

§ 165.79(1)
St v Lee
192 Wis. 2d 260
(Ct. App. 1995)
CAUTION:
197 Wis. 2d 959
(1996) vacates *St v Lee*

b. Defendants may be entitled to have the Crime Lab conduct tests on their behalf if the Ct in its discretion considers

- That Crime Lab has ability to do analysis
- Costs or other burdens of performing the analysis
- Def's ability to have tests done independently
- Potential value of test results to Def
- Effect results may have on trial or need to have a trial

§ 971.23(1)(h)

8) Any exculpatory evidence

§ 971.23(2m)

B. Duty of Def to disclose within a reasonable time before trial

§ 971.23(2m)(a)

1) List of all witnesses excluding Def, rebuttal, or impeachment witnesses

§ 971.23(2m)(am)

a. Any relevant written or recorded statements of a witness, including expert reports and summaries about

- Physical exams
- Mental exams
- Scientific testing

St v Revels
221 Wis. 2d 315
(Ct. App. 1998)

b. If an expert to be called at trial has not prepared a report, the defense may be required to provide a summary of expert's findings or a statement of the subject matter of the testimony, and to disclose results of any scientific test, experiment, or comparison

St v McClaren
2009 WI 69
318 Wis. 2d 739

c. Ct may order Def who claims self-defense to produce summary of evidence of violent acts committed by the victim, which Def knew about at the time of the crime and which bear on the reasonableness of the self-defense claim. *See McMorris v State*, 58 Wis. 2d 144 (1973)

§ 971.23(2m)(b)

2) Criminal record of a Def witness, which is known to DA

§ 971.23(2m)(c)

3) Any physical evidence that Def intends to offer in evidence at trial

§ 971.23(5)

C. Scientific testing and psychiatric testing

St v Stanislawski
62 Wis. 2d 730 (1974)
Wold v St
57 Wis. 2d 344 (1973)

1) On a motion of a party, Ct may order the production of any item of physical evidence that is intended to be introduced at trial for scientific analysis

a. Under such terms and conditions as Ct may prescribe

§ 971.23(5c)

2) In prosecutions for sexually motivated offenses, Ct may not condition testimony of any witness on submission to psychiatric or psychological test to assess credibility

§ 971.23(6)

D. Protective order

St v Bowser
2009 WI App 114
321 Wis. 2d 221

1) Upon motion of a party, Ct may at any time order that discovery, inspection, or the listing of witnesses requested be denied

2) If either party certifies that witness may suffer physical or economic harm, Ct may order a deposition under § 967.04(2)–(6)

3) Name of witness need not be divulged before deposition

4) Deposition admissible at trial if witness becomes unavailable or for impeachment

§ 971.23(6m)

E. In camera proceedings

1) Either party may move for an in camera inspection by Ct of any document required to be disclosed for the purpose of masking or deleting any material not relevant to case being tried

§ 905.10

2) Proceedings to determine whether identity of informant should be disclosed to the defense must be conducted in camera

§ 971.23(7)

F. Continuing duty to disclose

1) If before or during trial, party discovers additional material or the names of additional witnesses requested, which are subject to discovery, inspection, or production, party shall promptly notify other party of the existence of the additional material or names

§ 971.23(7m)

G. Sanction for failure to comply

§ 971.23(7m)(a)
Taylor v Illinois
108 S. Ct. 646 (1988)
St v Prieto
2016 WI App 15
366 Wis. 2d 794
St v Wild
146 Wis. 2d 18
(Ct. App. 1988)

1) Ct shall exclude any witness not listed or evidence not presented for inspection or copying that is required, unless good cause is shown for failure to comply

a. Ct may grant opposing party a recess or continuance

St v Miller
2004 WI App 117
274 Wis. 2d 471

b. If State's evidence is excluded before trial because of discovery violation and Ct then dismisses charges without prejudice, State is not precluded from refiling the same charges

§ 971.23(7m)(b)
Taylor v Illinois
108 S. Ct. 646 (1988)

2) In addition to or in lieu of any sanction, Ct may advise jury of any failure or refusal to disclose

St v Hahn
221 Wis. 2d 670
(Ct. App. 1998)

3) Imposition of a sanction for violation of Ct's discovery order is within Trial Ct's discretion

H. Notice of alibi

§ 971.23(8)(a)

1) Def must give DA notice of intent to rely on alibi as defense at arraignment or at least 30 days before trial

a. Notice must state with particularity place where Def claims to have been when crime alleged to have been committed

b. Names and addresses of witnesses to alibi must be included, if known

St v Burroughs
117 Wis. 2d 293 (1984)
Alicea v Gagnon
675 F2d 913
(7th Cir 1982)

c. CAUTION: May be unconstitutional as applied

2) State may not comment on Def's failure to call some or all of alibi witnesses or withdrawal of alibi as a defense

a. If Def withdraws alibi at close of State's case

b. Or, if Def does not call some or any of alibi witnesses during own case

3) State may call alibi witness of defense for any purpose other than to impeach Def's credibility regarding alibi notice

§ 971.23(8)(b)

4) No evidence of alibi to be received if no notice of alibi given, unless Ct orders for cause

§ 971.23(8)(c)

a. Ct may enlarge time for filing notice of alibi

§ 971.23(8)(d)

5) State must furnish notice in writing to defense of names and addresses, if known, of witnesses to be offered in rebuttal to alibi

a. Notice must be furnished within 20 days after receipt of Def's notice of alibi, or within other time as Ct orders

b. No rebuttal evidence of alibi received if State fails to give notice, unless Ct otherwise orders for cause

§ 971.23(8)(d), (e)

6) Any witness called pertaining to alibi must be identified as such on written lists

§ 971.23(10)

I. Copying costs in cases involving indigent Defs

1) For item discoverable, SPD shall pay any fee charged for the copies

Wis Adm Code Ch PD 3

2) Fee for copies may not exceed the applicable maximum fee for copies of discoverable materials that is established by rule under § 977.02(9)

§ 971.23(5), (9)
§ 972.11(1)
St v Peters
192 Wis. 2d 674
(Ct. App. 1995)

J. Admissibility of DNA evidence results

1) See **CR 28**

4. Other Specific Discovery Rights

A. Confidential and privileged records

§ 146.82(1)

1) Patient health care records are confidential

§ 146.82(2)(a)4.

Confidential patient health care records may be disclosed pursuant to a lawful order of a Ct of record

Wis Const art. I, § 9m
St v Johnson
2023 WI 39
407 Wis. 2d 195

2) Patients have a privilege to refuse and prevent disclosure of confidential communications made or information obtained or disseminated for diagnosis or treatment of physical, mental, or emotional condition

§ 905.04(4)(b)

a. There are exceptions regarding Ct-ordered examinations in guardianship or protective placement

b. There is no such exception for Ct-ordered in camera review of a victim's privately held, privileged health records upon a criminal Def's motion

PRACTICE RECOMMENDATION: Def may request waiver of the privilege and release of the records, but there is no remedy should victim decline.

§ 905.11
St v Speese
191 Wis. 2d 205
(Ct. App. 1995)
rev'd on other grounds
199 Wis. 2d 597 (1996)

3) Privilege is waived if the holder voluntarily discloses or consents to disclosure of the confidential matter or communication or any significant part thereof

§ 48.396(2)
§ 48.78(2)(a)
§ 938.396(2)
§ 938.78(2)(a)
Pennsylvania v Ritchie
107 S. Ct. 989 (1987)
Rock Cty Dept of Soc Servs v DeLeu (In Int of KKC)
143 Wis. 2d 508
(Ct. App. 1988)

4) Criminal Def may seek in camera review by Juv Ct Judge of any type of Juv record, including Juv Ct file itself

St v Rizzo
2002 WI 20
250 Wis. 2d 407
overruled in part on other grounds by
St v Johnson
2023 WI 39
407 Wis. 2d 195
St v Jensen
147 Wis. 2d 240 (1988)

B. Victims of sexual assault: Def's right to have own expert(s) perform examination of victim

1) Applies only if State intends to introduce expert testimony of examining psychologist at trial, whose examination done at request of State and

2) Def must prove a "compelling need" for own expert(s) which Ct determines by considering following factors

a. Nature of examination

b. Victim's age

c. Potential physical and emotional effects on victim

d. Probative value to issues in case

e. Time between offense date and proposed exam

f. Other available evidence

g. If personal exam essential to formation of opinion by the expert

St v Maday
179 Wis. 2d 346

(Ct. App. 1993)

3) If victim refuses to participate in exam, appropriate sanction is to prevent State's expert from testifying about exam

§ 971.23(5c)

a. However, if prosecution for sexual assault (under §§ 940.225, 948.02, or 948.025) or for any other crime that Ct determines was sexually motivated, as defined in § 980.01(5), Ct may NOT order any witness or victim, as a condition of allowing testimony, to submit to a psychiatric or psychological examination to assess his or her credibility

St v Mainiero
189 Wis. 2d 80
(Ct. App. 1994)

4) If victim seeks out professional help on own, disclosure rules under *Ritchie* apply and not those under *Maday*

C. Mental health records of Def who enters NGI plea

§ 51.30(4)(b)4.
St v Taylor
142 Wis. 2d 36
(Ct. App. 1987)

1) NGI plea eliminates privilege and confidentiality

Billy Jo W v Metro
(In re Mental Cond
of Billy Jo W)
173 Wis. 2d 310
(Ct. App. 1992)
rev'd on other grounds
182 Wis. 2d 616 (1994)

2) However, release under § 51.30(4)(b)4. must be limited to those providing services to the subject or relevant to an issue before the Ct

§ 905.10(3)(b)
St v Nellessen
2014 WI 84
360 Wis. 2d 493

D. Confidential informers: Defense request to disclose

1) State may claim a privilege to refuse to disclose identity of an informer

St v Nellessen
2014 WI 84
360 Wis. 2d 493

2) If Def makes initial showing of reasonable possibility, grounded in the facts and circumstances of the case, that a confidential informer may have information necessary to the Def's theory of defense, Ct must conduct in camera review to determine whether informant may be able to provide relevant testimony

3) Proof in camera will usually be by affidavit. Ct may take testimony if Ct finds that matter cannot be resolved satisfactorily by affidavit

St v Vanmanivong
2003 WI 41
261 Wis. 2d 202

4) Disclosure is necessary only if informer's testimony could create reasonable doubt in jurors' minds

5) If Judge finds reasonable probability that informer can give testimony and State refuses to disclose identity, sanction is dismissal of charges to which testimony would relate

5. Exculpatory Information

A. Standard

§ 971.23(1)(h)
Brady v Maryland
83 S. Ct. 1194 (1963)

1) State has affirmative duty to disclose to Def any evidence favorable to the accused, if evidence material either to guilt or punishment

2) Does not depend on good or bad faith of prosecutor

3) Basis is to protect Def's due-process right to fair trial

St v Wayerski
2019 WI 11
385 Wis. 2d 344
Brady v Maryland
83 S. Ct. 1194 (1963)

4) *Wayerski* overrules former *Brady* standards:

a. Evidence no longer need be in State's exclusive possession or control

b. Now evidence must be disclosed even if available to Def through reasonable diligence

c. Now evidence must be disclosed whether or not an intolerable burden on Def to obtain the information

Britton v St
44 Wis. 2d 109 (1969)

B. Distinction: Discovery versus disclosure

1) Discovery emphasizes Def's right of access to evidence necessary to prepare case; not constitutional

2) Disclosure emphasizes State's duty to disclose exculpatory evidence to Def; constitutional issue decided on case-by-case basis

C. Extent of disclosure required

US v Valenzuela-Bernal
102 S. Ct. 3440 (1982)

Moore v Illinois
92 S. Ct. 2562 (1972)

1) No requirement of complete, detailed account of all investigatory work done, or prosecutor's litigating strategies

St v Wayerski
2019 WI 11
385 Wis. 2d 344

2) Disclosure is required of all evidence helpful to Def

St v Wayerski
2019 WI 11
385 Wis. 2d 344

3) If State is aware that witness has pending prosecution, that must be disclosed

4) No duty to conduct discovery examination for defense

St v Calhoun
67 Wis. 2d 204 (1975)

5) State must disclose, even though prosecutor entertains personal doubt as to whether exculpatory

St v Stanislawski
62 Wis. 2d 730, 746–48
(1974)

6) Scientific proof or expert testimony favorable to Def must be disclosed whether State intends to introduce it

St ex rel Lynch v Cty Ct
82 Wis. 2d 454 (1978)

7) Duty to disclose commences at earliest opportunity, as soon as State recognizes exculpatory character

a. Duty continues and applies to evidence received after disclosure request made

St ex rel Lynch v Cty Ct
82 Wis. 2d 454 (1978)

8) At prelim, in absence of particularized need, defense must rely on prosecutor to identify exculpatory evidence since charge not final

a. At prelim, request to examine file will be denied, unless showing of particularized need made

US v Bagley
105 S. Ct. 3375 (1985)
Strickland v Washington
104 S. Ct. 2052 (1984)
St v Garrity
161 Wis. 2d 842
(Ct. App. 1991)

D. Duty to disclose exculpatory information—two-part test

1) Test applies whether Def makes no request for exculpatory information, a general request, or a specific request

2) First prong: Evidence must be "favorable to the accused"

US v Agurs
96 S. Ct. 2392 (1976)

a. Prosecutor must disclose to Def if favorable

b. Prosecutor may, if doubtful, submit to Ct for in camera inspection by Judge to determine whether exculpatory

c. State not arbiter of weight, credibility, and exculpatory nature of evidence

US v Bagley
105 S. Ct. 3375 (1985)
St v Garrity
161 Wis. 2d 842
(Ct. App. 1991)

3) Second prong: Evidence must be material either to guilt or to punishment

a. Must be reasonable probability that result would have been different if evidence had been disclosed to defense

b. Probability must be sufficient to undermine confidence in outcome

US v Pollack
534 F2d 964
(DC Cir 1976)

4) Evidence must be made available to defense in time to make reasonable use of it

Jones v St
69 Wis. 2d 337 (1975)

5) Prosecutor has affirmative duty to acquire all relevant evidence

Wold v St
57 Wis. 2d 344 (1973)

a. Includes arrest records from all investigating staff and agencies

b. Test is whether, with exercise of due diligence, prosecution should have discovered evidence

Giglio v US
92 S. Ct. 763 (1972)
McLemore v St
87 Wis. 2d 739 (1979)
Loveday v St
74 Wis. 2d 503 (1976)

c. Evidence going to credibility of State's witnesses is exculpatory

Brady v Maryland
83 S. Ct. 1194 (1963)
St v Outlaw
108 Wis. 2d 112, 136
(1982)

d. State must disclose exculpatory information or testimony, otherwise forgo prosecution

E. Effect of nondisclosure

1) Character of evidence determines whether nondisclosure caused constitutional error

St v Hineman
2023 WI 1
405 Wis. 2d 233

a. Evidence is material only if reasonable probability that result would have been different had evidence been disclosed

- "Reasonable probability' is a probability sufficient to undermine confidence in the outcome"

Ruiz v St
75 Wis. 2d 230, 241
(1977)

b. If evidence creates reasonable doubt that did not otherwise exist (i.e., probative of innocence), new trial required

Ruiz v St
75 Wis. 2d 230, 242
(1977)

- If evidence would merely give Def a better "sporting chance" of undermining witness's credibility, but would not create reasonable doubt, no new trial

- If verdict questionable, undisclosed information, even of relatively minor importance, may create reasonable doubt

Tucker v St
84 Wis. 2d 630 (1978)

c. If conviction rests on perjured testimony that prosecutor knew or should have known was perjured and if there is reasonable likelihood that it affected jury's judgment, conviction set aside

St v Randall
197 Wis. 2d 29
(Ct. App. 1995)

d. If other compelling evidence of guilt and no indication that evidence/testimony was tainted, then, harmless error

St v Harris
2004 WI 64
272 Wis. 2d 80

2) If discovered after guilty plea, may be grounds for withdrawal

St v Calhoun
67 Wis. 2d 204 (1975)

3) If evidence discovered during trial, Ct should consider available alternatives to mistrial

Recommendation

a. Alternatives to mistrial should be reviewed and evaluated on record

St v Calhoun
67 Wis. 2d 204, 218
(1975)

b. Penalty for breach of disclosure should fit nature of proffered evidence and remove harmful effect on Def

St v Calhoun
67 Wis. 2d 204, 218
(1975)

c. Alternatives (in order of preference)

- Grant recess or continuance to allow Def to investigate or acquire rebutting evidence to eliminate surprise and prejudice to Def
- Exclude evidence from use at trial
- Grant mistrial

St v Copening
100 Wis. 2d 700 (1981)

d. If mistrial declared

- Must have record that establishes relevant and material facts and factors in ruling
- Record should reflect what occurred before trial regarding demands as to disclosure, discovery or inspection; compliance by State

St v Hahn
132 Wis. 2d 351
(Ct. App. 1986)

e. Dismissal of case with prejudice appropriate if adequate defense impossible

4) If evidence discovered after trial

St v Hineman
2023 WI 1
405 Wis. 2d 233

a. Evidence must create a reasonable probability of a different result at trial

US v Agurs
96 S. Ct. 2392 (1976)

b. No constitutional violation requiring new trial, unless information creates reasonable doubt that otherwise did not exist

c. Mere possibility that item may have been helpful to defense not enough

6. Preservation of Exculpatory Evidence

Arizona v Youngblood
109 S. Ct. 333 (1988)
California v Trombetta
104 S. Ct. 2528 (1984)
St v Greenwold
189 Wis. 2d 59
(Ct. App. 1994)

A. Prosecution has duty to preserve exculpatory evidence

St v Huggett
2010 WI App 69
324 Wis. 2d 786

1) Based on due-process right to meaningful opportunity to present complete defense

2) Limited to evidence that might be expected to play significant role in defense

St v Oinas
125 Wis. 2d 487
(Ct. App. 1985)

a. Exculpatory value apparent before evidence destroyed

St v Pankow
144 Wis. 2d 23
(Ct. App. 1988)

b. No duty to preserve samples, even if useful to Def, unless Def shows bad-faith destruction by State

St v Munford
2010 WI App 168
330 Wis. 2d 575

c. Def must show that evidence had apparent exculpatory value before its destruction

St v Hahn
132 Wis. 2d 351
(Ct. App. 1986)

3) Evidence of such nature that Def would be unable to obtain comparable evidence by other reasonably available means

St v Holt
128 Wis. 2d 110
(Ct. App. 1985)

4) Additional factors to consider

a. Presence or absence of State's bad faith

b. Timeliness of Def's request for evidence

St v Hahn
132 Wis. 2d 351
(Ct. App. 1986)

B. Sanction within Ct's discretion

1) Dismissal of case with prejudice appropriate if adequate defense would be impossible

California v Trombetta
104 S. Ct. 2528 (1984)

2) Suppression of evidence

7. Postconviction Discovery Issues

St v O'Brien
214 Wis. 2d 328
(Ct. App. 1997)
aff'd, 223 Wis. 2d 303
(1999)

A. To obtain postconviction discovery of physical evidence, Def must show that evidence sought is "consequential" to issue in case

1) "Consequential evidence" is evidence that creates reasonable probability of different trial outcome

St v Parker
2002 WI App 159
256 Wis. 2d 154
St v Noble
2001 WI App 145
246 Wis. 2d 533
rev'd on other grounds
2002 WI 64
253 Wis. 2d 206

B. Def's due-process rights are violated by posttrial destruction of evidence and new trial is required, if evidence destroyed was

1) Apparently exculpatory and of such nature that Def would be unable to obtain comparable evidence by other reasonable means, OR

2) Potentially exculpatory and was destroyed in bad faith

§ 974.07
St v Denny
2017 WI 17
373 Wis. 2d 390

C. Def may move for DNA testing of "relevant" evidence; however, Ct may deny motion if evidence of guilt is overwhelming

CR 11: DEPOSITIONS OF WITNESSES

1. Adult Witnesses

§ 967.04(5)
St v Temby
108 Wis. 2d 521
(Ct. App. 1982)

A. Witness must in fact be unavailable to testify at trial

§ 967.04(5)

B. State must make good-faith effort to obtain presence at trial

§ 967.04(1)

C. Testimony of witness must be competent, relevant, material, and necessary to prevent failure of justice

D. Procedure

§ 967.04(2)

1) Notice to other party

§ 967.04(3), (6), (8)

2) Civil procedure rules on depositions (Ch 804) and statutes governing videotape depositions (§§ 885.44–.47) apply

§ 967.04(4)

3) Def must personally attend; failure to attend is waiver of confrontation right

2. Child Witness—Audiovisually Recorded Depositions

§ 967.04(7)(a)

A. Upon motion of either party and after notice and hearing Ct may order deposition of child witness to be taken by audiovisual means if trial or hearing will commence

1) Before child's 12th birthday, or

2) Before child's 16th birthday, if warranted by interests of justice

St v Thomas
150 Wis. 2d 374 (1989)
St v Street
202 Wis. 2d 533
(Ct. App. 1996)

B. Special audiovisual recording procedure may only be ordered upon finding that particular child under particular circumstances of case requires special procedure as protection from trauma

1) Generalized statutory policies alone not sufficient to support order for audiovisual recording

§ 967.04(7)(b)

C. Factors Ct may consider in determining interests of justice

1) Child's chronological age, level of development, and capacity to comprehend significance of events and to verbalize them

2) Child's general physical and mental health

3) Whether events about which child will testify constituted criminal or antisocial conduct against child or person with whom child has close emotional relationship

a. If such conduct constitutes physical or sexual assault, its duration and extent of physical or emotional injury caused

4) Child's custodial situation and attitude of other household members to events about which child will testify and to underlying proceeding

5) Child's familial or emotional relationship to Def

6) Child's behavior at or reaction to previous interviews concerning events involved

7) Whether child blames self for events involved or has ever been told by any person not to disclose them

8) Whether child's prior reports of event to associates or authorities have been disbelieved or not acted upon

9) Child's subjective belief regarding consequences to self or persons with whom child has close emotional relationship, to ensue from providing testimony

10) Whether child manifests or has manifested symptoms associated with posttraumatic stress disorder or other mental disorders

11) Number of separate investigative and judicial proceedings at which child's testimony may be required, likely length of time until last such proceeding, and mental or emotional strain associated with keeping child's recollection of events witnessed fresh for that period of time

12) Whether use of recorded deposition would reduce mental or emotional strain of testifying and whether deposition could be used to reduce number of times child will be required to testify

§ 967.04(8)

D. Conduct of deposition to be recorded by audiovisual means

1) Ct must preside

§ 885.44–.47

2) Statutes on videotape depositions apply

3) Ct must seek to ensure deposition taken to minimize child's mental and emotional strain and should

a. Schedule deposition on date when child's recollection likely to be fresh and at time of day when child's energy and attention span are greatest

b. Schedule deposition in room that provides adequate privacy, freedom from distractions, informality, and comfort appropriate to child's developmental level

c. Order recess whenever energy, comfort, or attention span of child warrants

d. Determine that child understands it is wrong to tell a lie and will testify truthfully if child's developmental level or oral skills such that administration of oath or affirmation in usual form would be inappropriate

e. Before questioning by parties begins, attempt to place child at ease, explain to child purpose of deposition, and identify all persons attending

f. Allow any questioner to have advisor to assist and, upon permission of Judge, to conduct questioning

g. Supervise spatial arrangements of room and location, movement, and deportment of all persons in attendance

h. Allow child to testify while sitting on floor, platform, appropriately sized chair, or lap of trusted adult, or while moving about room within range of visual or audio recording equipment

i. Bar or terminate attendance of any person whose presence not necessary to taking of deposition, or whose behavior disruptive of deposition or unduly stressful to child. Reasonable number of persons deemed by Ct supportive of child or any Def may be considered necessary to taking of deposition

Coy v Iowa
108 S. Ct. 2798 (1988)
St v Thomas
150 Wis. 2d 374 (1989)

4) Ct may employ sight screen between witness and Def only based on finding of particular necessity

St v Street
202 Wis. 2d 533
(Ct. App. 1996)

a. Must make case-specific finding after evidentiary hearing that child would be traumatized by testifying in Def's presence

b. Jury should be instructed not to draw any inferences from presence of screen

5) Ct must seek to ensure that audiovisual record conveys to viewer impressions as nearly identical as possible to those viewer would receive if observing child's testimony in person

§ 885.44
§ 885.47

a. Ct must enforce applicable statutes regarding videotape deposition procedures and playback equipment

b. Objections and rulings must be made as if at trial

§ 967.04(8)(b)9.

6) Ct must seek to ensure that each Def has appropriate and adequate opportunity to cross-examine child and must

a. Permit Def to be in a position from which Def can see and hear child's testimony and can communicate privately and conveniently with counsel

§ 967.04(8)(b)10.

b. Upon request by Def, make appropriate orders for discovery and examination of documents and other evidence in possession of State relevant to issues to be covered at deposition

- At reasonable time before deposition

§ 967.04(8)(a)

E. Custody of and access to audiovisually recorded deposition

1) Certified original recorded deposition kept in secure place by Clerk of Ct

2) Inspected or copied only by Ct order for

§ 885.44(12)

a. Editing

b. Investigation, prosecution, or defense of action for which authorized

c. Provision of services to child

§ 967.04(9)

F. Admission of audiovisually recorded depositions at trial/hearing

1) May be admitted without additional hearing under § 908.08

St v Sorenson
152 Wis. 2d 471
(Ct. App. 1989)

2) Audiovisually recorded deposition is functional equivalent of live testimony and is not hearsay

§ 967.04(10)

3) If recorded deposition admitted, child may not be called as witness at that proceeding except upon showing

a. That additional testimony of child required in interest of fairness for reasons not known and not discoverable with reasonable diligence at time of deposition by party seeking to call child

3. Audiovisually Recorded Statements of Children

A. See CR 26, Sec. 9.A.

4. Confrontation

A. See CR 26, Sec. 8

CR 12: COMPETENCY TO PROCEED

1. Definitions

§ 971.13(1)

A. Def lacks substantial mental capacity to understand proceedings or assist in defense

St v Leach
122 Wis. 2d 339
(Ct. App. 1984), *rev'd on other grounds*,
124 Wis. 2d 648 (1985)

1) Test of mental capacity is

Godinez v Moran
113 S. Ct. 2680 (1993)
St v Garfoot
207 Wis. 2d 214 (1997)

a. Whether Def has sufficient present ability to consult with Atty with reasonable degree of rational understanding, and

b. Whether Def has rational as well as factual understanding of proceedings

c. At very least, must understand essence of charge, defenses available, and essentials of criminal proceedings

St v Garfoot
207 Wis. 2d 214 (1997)

2) One who is mentally ill or who has an intellectual disability is not necessarily incompetent to stand trial

a. Determination of competence is individualized, fact-specific decision regarding particular individual's mental capabilities

St ex rel Haskins v Dodge Cty Ct
62 Wis. 2d 250 (1974)

3) Incompetency is judicial rather than medical determination

§ 971.13(2)

4) Def not incompetent to proceed solely because medication used to restore or maintain competency

§ 971.13(3)

B. Legal objections to prosecution under § 971.31 may be heard regardless of incompetence, provided

1) Motion susceptible to fair determination before trial

2) Personal participation of Def not required

2. Raising Issue of Competency to Proceed

§ 971.13(1), § 971.14(1r)
St v Smith
2016 WI 23
367 Wis. 2d 483
St v Byrge
2000 WI 101
237 Wis. 2d 197
St v Debra AE
188 Wis. 2d 111 (1994)

A. Sec.

971.14 competency issue can be raised at any stage of criminal proceedings

1) May be raised by Def, Def's Atty, or DA

St v Daniel
2015 WI 44, ¶¶ 27–28
362 Wis. 2d 74

2) MUST be raised by Atty when Atty has reason to doubt competency

St v Meeks
2003 WI 104, ¶¶ 44–46
263 Wis. 2d 794

a. Atty raising issue of competency does not violate Atty-Client privilege and is not required to state reasons or offer Atty's opinions, perceptions, and impressions of client's competency

St v Haskins
139 Wis. 2d 257
(Ct. App. 1987)

b. When Atty has reason to doubt competency of client and fails to raise issue with Trial Ct, Atty's representation deemed deficient

Pate v Robinson
86 S. Ct. 836 (1966)

3) Ct has independent obligation to raise competency issue sua sponte

St v Guck
176 Wis. 2d 845, 851
(1993)

4) Def cannot waive defense of incompetency to stand trial

B. Ct must have reason to doubt Def's competency

St v McKnight
65 Wis. 2d 582 (1974)

1) Basis for doubt must exist beyond Def's own statements

Drope v Missouri
95 S. Ct. 896 (1975)

2) Atty's representation of Def's incompetency is factor, but not conclusive

St v McKnight
65 Wis. 2d 582 (1974)

3) Must be supported by facts giving rise to doubt

971.14(1r)(a)
St v Guck
176 Wis. 2d 845 (1993)

C. Ct shall proceed under § 971.14(1r)(a) whenever there is reason to doubt Def's competency to proceed

3. Determination of Probable Cause

A. Purpose: To avoid unnecessary competency proceedings when charge not supported by probable cause

B. Alternative procedures to establish probable cause

§ 971.14(1r)(b)

1) Conclusive presumption of probable cause exists when competency issue arises after

a. Def already bound over for trial after prelim, or

b. Def already found guilty by jury or Ct

§ 971.14(1r)(c)

2) Ct may find probable cause based on complaint, provided

a. Def does not submit affidavit alleging with particularity that complaint materially false, and

b. Probable cause finding can be made without evidentiary hearing

§ 971.14(1r)(c)

3) Evidentiary hearing required if Def submits affidavit alleging with particularity that complaint materially false

§ 971.14(1r)(c)

a. Ct must limit issues and witnesses to those required to determine probable cause

§ 911.01(4)(c)

b. Rules of evidence do not apply, except Ch 905 privileges

§ 971.14(1r)(c)

c. Def may cross-examine and call witnesses

d. Standard of proof

- Same standard as probable cause at prelim

St v McKnight
65 Wis. 2d 582 (1974)

- Whether it is probable Def committed crime charged, based on evidence and reasonable inferences

e. Ct's finding must be based on

- The complaint, and
- The evidence presented

§ 971.14(1r)(c)

f. Ct may receive testimony on record by telephone or live AV means

- On showing of good cause

C. Disposition after probable cause determination

1) If probable cause not found

§ 971.14(1r)(c)

a. Ct must dismiss charge without prejudice, or

St ex rel Brockway v
Milw Cty Cir Ct
105 Wis. 2d 341
(Ct. App. 1981)

b. Ct may order Def held in custody or bail continued 72 hours pending issuance of new complaint, when

§ 971.31(6)

- Ct dismissed for defect in indictment, information, or complaint, or

§ 971.31(6)

- Ct dismissed for defect in institution of proceedings

2) If probable cause found, Ct to order examination

a. See **Examinations**, **Sec. 4**, *infra*

4. Examinations

RMC Form CR-205

A. Inpatient examinations

§ 971.14(2)(a)

1) Inpatient examination may be ordered only if Ct determines it necessary, and

§ 971.14(2)(b)

a. Def not released on bail, or

b. Def voluntarily cooperates, or

c. Def fails to cooperate in outpatient examination, or

d. Examiner informs Ct that inpatient observation necessary

§ 971.14(2)(a)

2) Ct must appoint one or more examiners

§ 971.14(2)(a)

3) Qualifications of examiner(s)

a. Examiner(s) must have specialized knowledge determined by Ct to be appropriate

b. Examiner(s) need not be physicians

§ 971.14(2)(a)

4) Def may be committed to suitable mental health facility

§ 971.14(2)(d)

5) If Def in custody, sheriff to transport Def to and from examination

§ 971.14(2)(c)

6) Time constraints

a. Examinations must be completed and reports filed within 15 days

b. One 15-day extension allowed, provided

- Examiner or facility requests, and
- Good cause shown

§ 971.14(2)(a)

7) Inpatient examination time establishes sentence credit under § 973.155

RMC Form CR-205

B. Outpatient examinations

§ 971.14(2)(a)

1) Ct must appoint one or more examiners

§ 971.14(2)(a)

2) Qualifications of examiner(s)

a. Examiner(s) must have specialized knowledge determined by Ct to be appropriate

b. Examiner(s) need not be physicians

§ 971.14(2)(c)

3) Examination must be completed and reports filed within 30 days

§ 971.14(2)(am)
RMC Form CR-205

C. Examination by DHS

1) If Ct orders Def examined by DHS or DHS facility, DHS must determine

a. Where examination to be conducted

b. Who will conduct examination

c. Whether examination to be conducted on inpatient or outpatient basis

2) Outpatient examination must be conducted in jail or locked unit of facility

3) If inpatient examination necessary, 15-day period for completing examination and filing reports begins on arrival of Def at facility

4) If outpatient examination begun and Dept determines inpatient examination necessary, sheriff must transport Def, unless Def released on bail

D. Examiner's duties

§ 971.14(2)(e)

1) Personally observe and examine Def

Examiners allowed access to Def's past and present treatment records

§ 971.14(3)

2) Submit written report to Ct

E. Contents of examination report

§ 971.14(3)(a)

1) Nature of examination

2) Identification of persons interviewed

3) Description of specific records reviewed

4) Description of any tests administered

§ 971.14(3)(b)

5) Clinical findings of examiner

§ 971.14(3)(c)

6) Examiner's opinion of Def's capacity to understand proceedings and assist in own defense

§ 971.14(3)(d), (5)(a)

7) If Def lacks competency, examiner's opinion of

a. Likelihood Def's competency will be restored through treatment, and

b. Likelihood competency will be restored within 12 months or maximum sentence for most serious charge, whichever is less

c. Whether Def's treatment should occur in inpatient facility designated by DHS, in community-based treatment program under DHS supervision, or in a jail or locked unit of facility that has entered into a voluntary agreement with State to serve as a location for treatment

§ 971.14(3)(dm)

8) Examiner's opinion, if sufficient information available, on

a. Whether Def needs medication or treatment

b. Whether Def not competent to refuse medication or treatment

- Def not competent to refuse medication or treatment if, because of mental disease, developmental disability, alcoholism, or drug dependence, and after advantages and disadvantages of, and alternatives to, accepting medication or treatment have been explained,

— Def is incapable of expressing understanding of advantages and disadvantages of accepting medication or treatment and alternatives, OR

— Def is substantially incapable of applying understanding of advantages, disadvantages, and alternatives to Def's condition in order to make informed choice as to whether to accept or refuse medication or treatment

KS v Winnebago Cty (In re Mental Cond of KS)
147 Wis. 2d 575
(Ct. App. 1988)

c. Explanation of medically unaccepted and unrecognized alternatives NOT required

§ 971.14(3)(e)

9) Facts and reasoning, in reasonable detail, forming basis of findings and opinions

§ 971.14(4)(a)

F. Ct must distribute copies of report

1) To DA and Def's Atty, or to Def personally if not represented

2) Upon request, to sheriff or jailer where Def held pending trial or sentencing

a. Sheriff or jailer may provide copy to health-care providers or medical record-keepers at jail

Billy Jo W v Metro (In re Mental Cond of Billy Jo W)
182 Wis. 2d 616 (1994)

3) Ct may not disclose report to others before hearing, but it becomes open record after competency hearing

§ 971.14(2)(g)

G. Def may be examined independently for competency purposes

1) By non-Ct-ordered examiners

2) At any stage of competency proceedings

3) Upon initiative of Def or DA

4) Examiners permitted reasonable access to Def

§ 971.14(2)(f)

H. Def may refuse medication or treatment, unless necessary to prevent physical harm to self or others

5. Competency Hearing

§ 971.14(4)(b)
St v Guck
176 Wis. 2d 845, 851
(1993)

A. Summary hearing and waiver

1) Held upon receipt of Ct-ordered examination reports

2) Ct must promptly determine Def's competence on basis of report if DA, Def, and Def's Atty waive opportunity to present other evidence

St v Guck
176 Wis. 2d 845, 853
(1993)

a. Def's Atty may waive presentation of evidence on Def's behalf; Atty may not waive presentation counter to Def's wishes

b. Ct should ascertain whether Def saw examination report and was advised of right to challenge its conclusions and cross-examine the evaluator at an evidentiary hearing

Recommendation

c. Personally inquire of Def re: knowledge of right to challenge report's validity and waiver of evidentiary hearing

3) If no waiver, Ct to hold evidentiary hearing

B. Evidentiary hearing

§ 971.14(4)(b)
St v Guck
176 Wis. 2d 845 (1993)

1) At start of hearing, Judge must personally inquire of Def whether Def claims to be competent or incompetent

St v Garfoot
207 Wis. 2d 214 (1997)

a. If Def stands mute or claims to be incompetent, Def to be found incompetent unless State proves by greater weight of credible evidence that Def competent

§ 971.14(4)(b)

b. If Def claims to be competent, Def must be found competent unless State proves by clear and convincing evidence that Def incompetent

St v Daniel
2015 WI 44, ¶ 53
362 Wis. 2d 74

c. If Def claims competency, but Def Atty asserts incompetency, burden is on State to prove competency by a preponderance of the evidence; burden is not on the Def Atty

§ 971.14(4)(b)

d. On approval by Ct for good cause, testimony may be received on record by telephone or live AV means

St v Meeks
2003 WI 104, ¶ 60
263 Wis. 2d 794

e. Atty required to raise issue of competency and does not violate Atty-Client privilege. Prior Atty's testimony regarding opinions, perceptions, or impressions of Def's competency barred by Atty-Client privilege

§ 971.14(4)(b)
St ex rel Matalik v Schubert
57 Wis. 2d 315 (1973)

2) Def has no right to jury determination

3) Def has right to due process, including

a. Notice of hearing

b. Promptly held hearing

c. Representation by Atty

d. Opportunity to introduce evidence contradicting examination reports

e. Sworn testimony

6. Competency Hearing Disposition (For Postconviction, See Sec. 10)

A. If Ct finds Def competent, criminal proceedings resume

§ 971.14(4)(d)

B. If Ct finds Def not competent and NOT LIKELY to become competent within 12 months or maximum sentence specified for most serious offense with which Def is charged, whichever is less

1) Proceedings suspended and Def released, or

Ct may order Def to appear in Ct at specified intervals for redetermination of competency to proceed

§ 971.14(6)(b)

2) Ct may order that Def be taken immediately into custody by law enforcement official and civil commitment or protective placement process begun

See **Transfer to Civil Proceedings**, Sec. 9, *infra*

Comment

3) Statutes do not specify who has burden, and what burden applies, of showing Def likely to become competent

a. Logically, burden should be on State as in initial competency determination

b. Applicable burden may be greater weight of credible evidence because phrase "not likely to become competent" is analogous to "more likely than not"

§ 971.14(5)
RMC Form CR-206

C. If Ct determines Def not competent but LIKELY to become competent within 12 months or maximum sentence specified for most serious offense with which Def is charged, whichever is less

1) Ct to suspend proceedings, AND

2) Ct to commit Def to DHS for DHS to determine whether treatment will occur in an appropriate institution designated by DHS, while under DHS supervision in a community-based treatment program under contract with DHS, or in a jail or locked unit of facility that has entered into voluntary agreement with State to serve as location for treatment

Comment

3) Statutes do not specify who has burden, and what burden applies, of showing Def likely to become competent

a. Logically, burden should be on State as in initial competency determination

b. Applicable burden may be greater weight of credible evidence because phrase "likely to become competent" is analogous to "more likely than not"

4) Days spent in commitment deemed days spent in custody under § 973.155

St v Moore
167 Wis. 2d 491 (1992)

a. Def entitled to sentence credit and good time under § 973.155 for commitment period

b. State may not confine incompetent person awaiting trial longer than it could a competent person either convicted or found NGI of same offense

St v Green
2022 WI 30
401 Wis. 2d 542

D. Circuit Ct lacks authority to toll the statutory time period to bring Def to competency

E. Involuntary Medication

§ 51.61(1)(g)
Winnebago Cty v Christopher S
2016 WI 1, 366 Wis. 2d 1

1) Def incompetent but likely to be restored has right to refuse medication and treatment

§ 971.14(5)(am)

2) If the Def is not subject to a medication order, DHS may file motion for hearing on Def's competency to refuse medication and treatment

a. Notice to Def's Atty, Def, and DA

b. Report on which motion based must accompany motion and notice of motion

c. Report must include statement signed by licensed physician that Def not competent to refuse medication and treatment

- Based on examination of Def by licensed physician

d. Ct must hold hearing within 10 days after motion filed

- Hearing may be postponed for up to 20 days after motion filed at request of Def, Def's Atty, or DA

Sell v US
123 S. Ct. 2174, 2184–85
(2003)
St v Fitzgerald
2019 WI 69
387 Wis. 2d 384

3) CAUTION: Sec. 971.14(3)(dm) and (4)(b) are unconstitutional for trial competency purposes unless *Sell* factors below are found by Ct:

a. Important governmental interest at stake (interest in bringing to trial one accused of a serious crime)

b. Involuntary medication will *significantly further* that governmental interest

c. Involuntary medication is necessary to further those interests; any less intrusive treatment is unlikely to achieve substantially the same result

d. Administration of the medication is medically appropriate, i.e., in patient's best interest in light of medical condition

St v Green
2021 WI App 18,
¶¶ 40–51
396 Wis. 2d 658
limited in part on other grounds
2022 WI 30
401 Wis. 2d 542

- To find *Sell* factors listed at paras. 3)b. and d. above, Ct must be presented with individualized treatment plan as applied to Def. Examiner must review medical history, comorbid medical conditions, and risk factors for side effects

§ 971.14(2)(f)
Sell v US
123 S. Ct. 2174, 2185
(2003)

4) Ct need not apply *Sell* factors if Ct finds forced medication is warranted for a different purpose—namely, person's health is gravely at risk or person is dangerous to self or others

5) Ct must make determination without jury

St v Green
2022 WI 30, ¶ 36 n.13
401 Wis. 2d 542

6) Involuntary medication orders are not subject to an automatic stay pending appeal

St v Guck
176 Wis. 2d 845 (1993)

F. Def cannot waive defense of incompetency to stand trial

7. Subsequent Hearings to Reevaluate Def's Competency

A. Examinations

§ 971.14(5)(b)

1) Def must be reexamined periodically by DHS examiners

§ 971.14(5)(b)

2) Written reports must be submitted to Ct

a. 3 months after commitment

b. 6 months after commitment

c. 9 months after commitment

d. Within 30 days before expiration of commitment

§ 971.14(5)(b)

3) Reports must include

a. Whether Def has become competent, or

b. If Def has not become competent, whether competency likely within remaining commitment period, or

c. If Def not competent and unlikely to become competent within remaining commitment period, examiner's opinion whether Def suffers

- Mental illness
- Alcoholism
- Drug dependence
- Developmental disability
- Other infirmity because of aging or like incapacities

§ 971.14(5)(c)

B. Hold a hearing within 14 days after receipt of report stating Def has regained competency or is not competent and is unlikely to become competent in remaining commitment period

C. Dispositions upon rehearing

§ 971.14(5)(c)

1) If Def found competent

a. Def discharged from commitment

b. Criminal proceedings resumed

§ 971.14(5)(d)

c. If Def receiving medication to maintain competency, Ct may order continued administration of medication for duration of proceeding

§ 971.14(5)(c)

2) If Def found incompetent, but making sufficient progress to competence

a. Commitment ordered to continue

§ 971.14(5)(c)

3) If Def found incompetent and unlikely to become competent within maximum allowed commitment time,

a. Continue suspension of proceeding, and

b. Release Def

- Ct may transfer to civil proceedings

D. Relapses into incompetency

§ 971.14(5)(d)

1) Applies when Def regains competency, but again becomes incompetent before conclusion of criminal proceedings

§ 971.14(5)(d)

2) Maximum commitment time

a. 18-month cumulative maximum

b. Formula for determination

- 18 months, minus days spent in previous commitments, or

- 12 months, whichever is less

8. Discharge from Criminal Commitment

§ 971.14(6)(a)

A. After 12 months or maximum sentence for most serious charge, whichever is less

B. Whenever Ct determines Def unlikely to regain competency within maximum allowable commitment time

C. Ct may order Def to reappear in Ct at specified intervals for redetermination of competency

D. Ct may order transfer to civil proceedings

9. Transfer to Civil Proceedings

§ 971.14(6)(b)

A. Ct may order Def committed to

1) Facility specified in § 51.15(2), or

2) Approved public treatment facility under § 51.45(2)(c), or

3) An appropriate medical or protective placement facility

B. Continued detention of Def governed by § 51.15, § 51.45(11), or § 55.135, as appropriate

C. DA may prepare statement that alone will suffice as a petition for commitment or protective placement

1) Based on criminal complaint and evidence in case

2) Filed with Ct

3) Copy sent to director of facility where Def sent

D. Ct may transfer case to branch of Circuit Ct exercising jurisdiction under Ch 51

§ 971.14(6)(b)

E. Days spent in commitment or protective placement do not establish sentence credit

§ 971.14(6)(c)

F. If Def committed under § 51.20 pursuant to petition

1) At least 14 days before expiration of order of commitment or any subsequent consecutive order, Cty Dept to notify

a. Ct that discharged person

b. DA for Cty in which that Ct located, and

c. Person's Atty in prior criminal proceeding

d. Unless Cty Dept or DHS has applied for extension

§ 971.14(6)(d)

2) Atty who has received notice or has otherwise learned that Def may have become competent, may move Ct to order that Def undergo a competency examination

a. If Ct orders competency examination, report must be filed and competency hearing held

Billy Jo W v Metro (In re Mental Cond of Billy Jo W)
182 Wis. 2d 616 (1994)

b. If Ct determines Def is competent, criminal proceeding to be resumed

c. If Ct determines Def not competent, Ct must release Def but may impose such reasonable nonmonetary conditions as will protect public and enable Ct and DA to discover whether person subsequently becomes competent

§ 971.14(6)(d)
St v Carey
2004 WI App 83
272 Wis. 2d 697

G. DA or Def's Atty may move Ct for redetermination of competency

H. See Probate Benchbook, MH 1, for full discussion of involuntary commitments

10. Postconviction Relief Proceedings

St v Debra AE
188 Wis. 2d 111 (1994)
See also St v Smith
2016 WI 23
367 Wis. 2d 483

A. Competency should be determined by Ct when it has reason to believe Def is

1) Unable to assist counsel; or

2) Unable to make decisions with reasonable degree of rational understanding

B. May be raised by State, Def's counsel or Ct sua sponte

C. Method of evaluation left to Ct's discretion

Sec. 971.14 does not apply post-sentencing

D. If hearing necessary, Ct should be "guided" by § 971.14(4) as much as possible

1) Ct grants motion to determine competency, or orders competency evaluation sua sponte, if has reason to doubt Def's competency based on

a. Motion, setting forth grounds of belief that Def incompetent

b. Evidence presented in proceedings

c. Def's colloquies with Ct

d. Def's courtroom demeanor

2) Upon finding "reason to doubt," Ct determines method for evaluating competency. Method left to Ct's discretion, including

a. Reliance on counsel's affidavit, stipulation, or Ct's own observations

b. Ordering examination of Def by person with specialized knowledge

c. Upon hearing, guided by § 971.14(4) to extent feasible

3) Burden of proof:

St v Debra AE
188 Wis. 2d 111, 132
(1994)

a. Should be guided by § 971.14(4) to the extent possible

St v Daniel
2015 WI 44, ¶ 53
362 Wis. 2d 74

b. If Def claims competency, but Def Atty asserts incompetency, burden is on State to prove competency by a preponderance of the evidence; burden is not on the Def Atty

E. If Def found incompetent, Ct should consider

1) Continuation of postconviction proceedings

§ 809.82(2)

2) Continuances or enlargement of time limits

§ 54.50

3) Appointment of temporary guardian

4) Expanding basis for raising issues at later proceeding after competency regained

St v Scott
2018 WI 74, ¶¶ 24–26
382 Wis. 2d 476,
limited on other grounds
by St v Green
2022 WI 30
401 Wis. 2d 542
St v Debra AE
188 Wis. 2d 111, 119
(1974)

5) Involuntary medication order only after *Debra AE* factors resolved

St ex rel Vanderbeke
v Endicott
210 Wis. 2d 502 (1997)

11. Probation Revocation Proceeding

A. Probationer has due-process right to competency determination when ALJ has reason to doubt probationer's competency during probation revocation proceedings

B. When ALJ has reason to doubt probationer's competence to proceed, Circuit Ct in Cty in which probationer was sentenced should make competency determination

1) Probation revocation proceeding and all applicable time limits stayed until competency proceeding held and determination made

2) If probationer in physical custody, custody continues to extent consistent with § 971.14

C. Competency proceeding should adhere to §§ 971.13 and 971.14 to extent practicable

D. Habeas may be used to return issue to Circuit Ct for review

CR 13: TAKING A PLEA

Larson v St
60 Wis. 2d 768 (1973)
Wis JI-Cr SM-32

1. Procedure for Taking a Plea

§ 967.08
§ 971.04(1)(g)
St v Soto
2012 WI 93, ¶¶ 46–48
343 Wis. 2d 43
St v Anderson
2017 WI App 17, ¶¶ 34, 42, 374 Wis. 2d 372
See ch CR 4

A. Def present in person in Ct unless:

1) Video or other means available in Ct enable Def to participate as if in courtroom

2) Def voluntarily, intelligently, and knowingly consents

3) If Def appears by telephone or live audiovisual means, record must show

a. Def informed unambiguously of right to be present in person

b. Ct inquires as often as necessary whether Def can see/hear and understand Ct and others

§ 971.095(2)

B. Ct to inquire whether DA has complied with consultation requirement of victims' rights law

C. Felony

1) Must have written information

a. Recess initial appearance to give DA opportunity to prepare and file written information before plea made

§ 971.01(2)
St v Woehrer
83 Wis. 2d 696 (1978)

b. Prosecutor has 30 days after bindover to file information or Ct loses personal jurisdiction

- Prosecutor may move Ct for order extending time for filing for cause

D. Plea Agreement

1) Prosecution states agreement and defense Atty and Def affirm correctness of plea agreement

Broadie v St
68 Wis. 2d 420, 423–24
(1975)

2) When plea is result of bargain, Ct need not go to same length to determine factual basis to sustain charge as with non-negotiated plea

St v Briggs
218 Wis. 2d 61
(Ct. App. 1998)

a. Ct must determine whether charge is legally cognizable

3) Ct may reject plea agreement that does not serve public interest

St v Conger
2010 WI 56, ¶ 48
325 Wis. 2d 664
St v Kenyon
85 Wis. 2d 36 (1978)
St v Lloyd
104 Wis. 2d 49
(Ct. App. 1981)

a. Prosecutor's motion to dismiss or amend charges as part of bargain subject to Ct review and may be rejected if not in public interest

St v Conger
2010 WI 56
325 Wis. 2d 664

- Law enforcement's view of proposed plea may be appropriate factor

St v Conger
2010 WI 56
325 Wis. 2d 664

- Ct may consider other *Conger* factors

Grant v St
73 Wis. 2d 441 (1976)

b. Plea agreements whereby relevant information concealed from Ct are against public policy

§ 967.055
St v Corvino
2016 WI App 52, ¶ 24
370 Wis. 2d 681

c. Specific findings must be made in OWI cases

4) Parties cannot enter conditional guilty pleas to preserve appellate review of an otherwise waived issue

St v Beyer
2021 WI 59, ¶ 29

397 Wis. 2d 616

Parties may stipulate to facts for purposes of a trial but cannot stipulate to a finding of guilt

St v McQuay
154 Wis. 2d 116 (1990)
St v Williams
2003 WI App 116
265 Wis. 2d 229

5) Judge cannot participate in plea negotiations

a. Ct is neither party to nor bound by plea agreement

St v Williams
2000 WI 78
236 Wis. 2d 293
St v Betts
129 Wis. 2d 1 (1986)
St v Marinez
2008 WI App 105
313 Wis. 2d 490

- Ct need not (but may) advise Def it will not follow sentencing recommendation

St v McQuay
154 Wis. 2d 116 (1990)

- Ct has affirmative duty to inform Def that Ct is not bound by plea agreement

6) Involves prosecutor, Def, and Def's Atty *only*

St v McQuay
154 Wis. 2d 116 (1990)

a. Probation or parole agents, law enforcement officials not bound by or party to agreement

St v Lee
88 Wis. 2d 239 (1979)

7) Agreement must be placed on record

St v Williams
2002 WI 1, ¶ 5
249 Wis. 2d 492
St v Reed
2013 WI App 132, ¶ 6
351 Wis. 2d 517

8) Plea agreements may be vacated based on a material and substantial breach

St v Reed
2013 WI App 132, ¶ 12
351 Wis. 2d 517

a. Remedy is in Circuit Ct's discretion

St v Reed
2013 WI App 132, ¶7
351 Wis. 2d 517

b. Not every breach requires a remedy. Nonbreaching party may be entitled to relief if breach deprives that party of a material and substantial benefit for which the party bargained

St v Brown
2006 WI 100
293 Wis. 2d 594
Ernst v St
43 Wis. 2d 661 (1969)

E. Record must affirmatively show that Trial Judge personally addressed Def and determined that

St v Schmidt
2021 WI 65, ¶ 18
397 Wis. 2d 758
Ernst v St
43 Wis. 2d 661 (1969)

1) Plea was voluntary

St v Hoppe
2009 WI 41
317 Wis. 2d 161
St v Moederndorfer
141 Wis. 2d 823
(Ct. App. 1987)

a. Can use waiver of rights form, as long as record affirmatively shows that Def read and discussed form with counsel and understood each right waived

St v Pegeese
2019 WI 60, ¶¶ 33, 36
387 Wis. 2d 119
RMC Form CR-227

b. Even with use of written form, a minimal personal colloquy needed

Rahhal v St
52 Wis. 2d 144 (1971)

2) Plea not involuntary merely because induced or motivated by desire to obtain lesser penalty, if Def has reasonable alternative, such as going to trial

St v Dawson
2004 WI App 173
276 Wis. 2d 418

3) Plea is involuntary if induced by promise that cannot be kept, e.g., to reopen and amend

St ex rel White v Gray
57 Wis. 2d 17 (1973)

4) Bargain involving concession to another person (especially sibling or loved one) bears close scrutiny for voluntariness because of potential psychological pressure in situation

a. Also review to determine whether such plea is in public interest before accepting plea agreement

St v Hunter
2005 WI App 5
278 Wis. 2d 419
St v Williams
2003 WI App 116, ¶ 11
265 Wis. 2d 229

5) Judicial participation in plea negotiation destroys plea's voluntariness

St v Dillard
2014 WI 123, ¶ 69
358 Wis. 2d 543

St v Howell
2007 WI 75, ¶ 37
301 Wis. 2d 350
St v Lackershire
2007 WI 74
301 Wis. 2d 418
St v Bangert
131 Wis. 2d 246 (1986)

6) Def understood charge and its consequences

a. Trial Judge must determine Def's understanding of nature of charge at plea hearing by any of following

St v Hendricks
2018 WI 15, ¶¶ 19, 33
379 Wis. 2d 549
St v Brown
2012 WI App 139
345 Wis. 2d 333

- Summarize elements of the offense, including party to a crime, if appropriate

- Ask Def's Atty whether Atty explained nature of charge to Def and ask Atty to summarize extent of explanation, including reiteration of elements

- Refer to record or other evidence of Def's knowledge, established before plea hearing, of nature of charge

St v Finley
2016 WI 63
370 Wis. 2d 402
St v Taylor
2013 WI 34,¶ 8
347 Wis. 2d 30

b. Def must be informed of maximum penalty and range of punishments, including penalty enhancers, that can be imposed

St v Muldrow
2018 WI 52, ¶ 8
381 Wis. 2d 492

- GPS monitoring is not a punishment

St v Williams
2018 WI 59, ¶ 43
381 Wis. 2d 661

- DNA surcharge is not a punishment

St v Schmidt
2021 WI 65
397 Wis. 2d 758

- Child pornography surcharge is not a punishment

c. Defense counsel may not speak for Def; Def must affirmatively state own knowledge and understanding of charge

St v Lackershire
2005 WI App 265,

¶¶ 14–15 & n6,
288 Wis. 2d 609
rev'd on other grounds
2007 WI 74
301 Wis. 2d 418
St v Parker
2001 WI App 111
244 Wis. 2d 145

d. Def's knowledge of collateral consequences not required, e.g., transfer to an out-of-state prison, or actual knowledge or comprehension of read-ins

§ 973.176(2)

e. Ct must inform Def in writing of voting ineligibility if sentenced on felony charge

Form DOC 2352/
RMC Form CR-218

- Ct shall use form designed by DOC under § 301.03(3a) to inform Def

St v Howell
2007 WI 75, ¶ 56
301 Wis. 2d 350
St v Lackershire
2007 WI 74, ¶ 33
301 Wis. 2d 418

7) Sufficient factual basis for the plea exists

St v Bangert
131 Wis. 2d 246 (1986)
St v Minniecheske
127 Wis. 2d 234 (1985)
Wis JI-Cr SM-32

8) Def knowingly waived constitutional rights

a. Right to jury trial and unanimous verdict

b. Right to proof beyond a reasonable doubt

c. Right to confront witnesses

d. Right to remain silent and not incriminate self

e. Right to call witnesses and use compulsory process

St v Shegrud
131 Wis. 2d 133 (1986)
St v Duychak
133 Wis. 2d 307
(Ct. App. 1986)

9) These rules also apply when Def enters plea of not guilty by reason of mental disease or defect (NGI)

a. Def pleading not guilty by reason of mental disease or defect admits, as matter of law, that but for lack of mental capacity, Def committed essential elements of crime

b. *Bangert* applies when Def chooses not to contest first phase of bifurcated trial

St v Francis
2005 WI App 161
285 Wis. 2d 451

10) Withdrawal of NGI plea is not a waiver of constitutional right and does not require colloquy

§ 971.08(1)(c), (2)
St v Fuerte
2017 WI 104, ¶ 19
378 Wis. 2d 504

11) Warning must be given personally at plea hearing using the statutory language; a *verbatim* reading is strongly preferred: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law"

a. Must be done at plea hearing

§ 971.06(3)
St v Baeza
174 Wis. 2d 118
(Ct. App. 1993)
St v Chavez
175 Wis. 2d 366
(Ct. App. 1993)

b. At the time of plea, Ct may not require Def to disclose citizenship status

Lee v US
137 S. Ct. 1958, 1968
(2017)
Padilla v Kentucky
130 S. Ct. 1473, 1486
(2010)
St v Shata
2015 WI 74
364 Wis. 2d 63
St v Ortiz-Mondragon
2015 WI 73
364 Wis. 2d 1

c. Recommendation: Ensure trial counsel advises Def if plea carries immigration consequences

St v Stockland
2003 WI App 177
266 Wis. 2d 549

12) Delivering rights to several Defs en masse is approved—typical in high-volume traffic and misdemeanor Cts—efficient and effective

F. Areas of inquiry of Def by Ct

St v Bangert
131 Wis. 2d 246 (1986)
St v Carter
131 Wis. 2d 69 (1986)

1) Intentional failure on part of Trial Judge to follow mandatory dictates of *Bangert* could be ground for judicial discipline

St v Hoppe
2009 WI 41, ¶ 18
317 Wis. 2d 161

2) Does Def understand following

a. Def does not have to enter into plea agreement; it is Def's own choice

St v Roou
2007 WI App 193
305 Wis. 2d 164

b. Elements of offense

- Have Def read information (complaint) pointing out elements of offense (including alleged prior convictions under repeater allegation, if any)

c. Power of Ct to sentence Def to presumptive minimum and maximum penalties, regardless of plea agreement

d. If plea accepted, Def will be found guilty of this offense

St v Straszkowski
2008 WI 65,
¶¶ 5–6, 92–94
310 Wis. 2d 259

e. For read-in offenses:

- Ct may consider read-in charges when imposing sentence
- Maximum penalty is not increased
- Def may be required to pay restitution on read-ins
- State is prohibited from future prosecution of read-ins

St v Frey
2012 WI 99
343 Wis. 2d 358

f. Charges dismissed, but not read in, may be considered at sentencing. Ct must determine what effect parties intend the dismissed charge to have on the plea. Ct must not use phrase "dismissed outright"

3) Determine that plea has not been induced by promises (other than plea agreement), threats, or force

St v Hampton
2004 WI 107
274 Wis. 2d 379

4) Ct must **personally** inform Def that Ct is not bound by plea agreement or recommendation of the State

5) Determine whether Def talked to DA or other officer about this case

a. Has Def made any written statements?

- Inquire into legality of those statements

b. Would Def be pleading guilty if Def had not talked or made written statements about case?

6) Determine whether Def understands constitutional rights and waiver of rights

a. To a jury trial and unanimous verdict

b. To hear testimony of witnesses and to cross-examine and confront them at trial with help of Atty

c. To call own witnesses at trial and to use subpoenas

St v Wilson
179 Wis. 2d 660
(Ct. App. 1993)

d. To give own testimony or to remain silent

e. To require the State to prove that Def committed each "element" of crime charged beyond a reasonable doubt

f. Def could not be convicted if State fails its burden of proof

7) Determine whether Def has had enough time to consult with Atty

8) Determine whether or not the Def has any questions of Ct or Def's attorney

a. Ct may grant recess, if necessary

9) Give appropriate warnings

§ 973.176(1)

a. Possession of firearms and potential charges for felony conviction

- Recommended at plea

- Required at sentencing

10) Inquire into Def's educational background, literacy, and ability to understand, such as mental or emotional or alcoholic and chemical disability issues

a. About rights being given up

b. About plea agreement

11) Reconfirm desire to enter plea after receiving all of the information

12) Inquire into voluntariness and intellectual understanding

St v Hoppe
2009 WI 41, ¶¶ 30–32
317 Wis. 2d 161

13) Use of waiver of rights/plea questionnaire eliminates need for much of above oral inquiry but is not a complete substitute for an in-Ct colloquy

St v Bonds
161 Wis. 2d 605
(Ct. App.),
rev'd on other grounds,
165 Wis. 2d 27 (1991)

G. Ct must then be provided with factual basis for plea that has been entered

§ 971.08(1)(b)
St v Howell
2007 WI 75
301 Wis. 2d 350
St v Lackershire
2007 WI 74
301 Wis. 2d 418

1) Ct must be satisfied that Def in fact committed crime charged

St v Thomas
2000 WI 13
232 Wis. 2d 714

2) Precise manner in which Ct satisfied left to discretion of Ct

3) Possible methods

a. Inquiry of prosecutor

b. Inquiry of Def

St v Smith
189 Wis. 2d 496 (1995)
St v Harrell
182 Wis. 2d 408
(Ct. App. 1994)

c. If plea is to an amended charge, make certain facts admitted support amended charge. Do not rely on facts in original complaint

§ 971.08(1)(b)

d. Require Def to admit elements of offense

St v Black
2001 WI 31
242 Wis. 2d 126

e. Stipulations of counsel that State would prove facts alleged on face of complaint, if case went to trial

St v Duychak
133 Wis. 2d 307
(Ct. App. 1986)

f. Documentary evidence such as police reports or transcript of prelim

St v Goldstein
182 Wis. 2d 251
(Ct. App. 1994)

g. Testimony from police officer, victims, or other witnesses

4) Inform Def that Def not required to answer—but does Def agree or disagree with facts presented by State?

§ 973.12
St v Rachwal
159 Wis. 2d 494 (1991)
St v Goldstein
182 Wis. 2d 251
(Ct. App. 1994)
St v Zimmerman
185 Wis. 2d 549
(Ct. App. 1994)

H. If repeater alleged, must be proved or admitted

St v Flowers
221 Wis. 2d 20
(Ct. App. 1998)

1) Certified judgment of conviction attached to charging document is sufficient

§ 939.62(2m)
St v Collins
2002 WI App 177, ¶ 11
256 Wis. 2d 697

a. Persistent repeater: to be subject to life imprisonment without parole or extended supervision, Def's admission of validity is sufficient, EXCEPT

§ 939.62(2m)(d)
St v Collins
2002 WI App 177
¶¶ 12–14,
256 Wis. 2d 697

b. When based on out-of-state conviction, admissions are insufficient; Trial Ct must make independent determination beyond a reasonable doubt that out-of-state conviction is comparable to Wisconsin serious felony

Recommendation

2) Ct should inquire personally whether Def admits to facts supporting repeater allegations

§ 973.12, § 939.62(2m),
§ 939.618
St v Rachwal
159 Wis. 2d 494 (1991)
St v Coolidge
173 Wis. 2d 783
(Ct. App. 1993)

I. Ct must be satisfied that Def committed the crime and/or any other special conditions and make a finding of such. Special conditions include repeater allegations, number of prior convictions, enhancer allegations, and *Alford* plea circumstances

§ 972.15(1)

J. Order preparation of PSI, if one to be made (in discretion of Ct)

1) Ct may not order DOC to prepare PSI on misdemeanor

§ 971.08(1)(d)

K. Ct must inquire whether DA complied with consultation requirement of victims' rights statute, § 971.095(2)

§ 972.14

L. If proceeding to sentencing immediately:

1) Ask DA, Def's Atty, and Def whether they have anything to say relevant to sentencing

2) Def has constitutional right to allocution

§ 972.14(2)

3) Ask whether there is any reason why sentence should not be pronounced

4) Pronounce sentence

§ 972.13
RMC Form CR-204

M. Have written judgment of conviction executed and filed

1) Signed by Judge or clerk

2. Vacating Plea After Acceptance

St v Comstock
168 Wis. 2d 915 (1992)

A. Ct may vacate guilty or no contest plea sua sponte only when it finds that there was fraud in procuring plea or that party intentionally withheld from Ct information that would have induced Ct not to accept plea

B. *See* CR 43, Withdrawal of Plea

3. Effects of Pleas

A. Plea of guilty

St ex rel Skinkis
v Treffert
90 Wis. 2d 528
(Ct. App. 1979)

1) Ordinary legal effect of guilty plea is to admit facts charged, but not the crime

St v Johnson
105 Wis. 2d 657, 663
(Ct. App. 1981)

a. Factual basis of Def's conduct must be shown by prosecutor's summary of evidence that State would offer at trial

b. Def does not admit charged crime

US v Broce
109 S. Ct. 757 (1989)
St v Pohlhammer
82 Wis. 2d 1 (1978)

2) When Def admits guilt of charged offense in fact, in open Ct, Def may attack only voluntary and intelligent character of guilty plea

B. No contest/nolo contendere plea

St v Robinson
2002 WI 9
249 Wis. 2d 553
Lee v
Bd of Dental Exam'rs
29 Wis. 2d 330, 333–34
(1966)

1) When accepted by Ct, plea constitutes implied confession (admission) for purpose of case to support conviction and "in that respect is equivalent to a plea of guilty." Guilty plea is unqualified admission and can be used in collateral matters; no contest/nolo contendere plea is qualified admission applying only to the case and cannot be used collaterally

C. *Alford* no contest or *Alford* guilty plea

St v Nash
2020 WI 85, ¶ 34
394 Wis. 2d 238
St v Multaler
2002 WI 35
252 Wis. 2d 54

1) Ct may accept no contest plea or guilty plea accompanied by claim of innocence

St v Smith
202 Wis. 2d 21 (1996)

a. Ct must determine that prosecutor's summary of evidence that State would offer at trial is strong proof of guilt

St v Nash
2020 WI 85, ¶¶ 35–39
394 Wis. 2d 238

St v Smith
202 Wis. 2d 21 (1996)

b. Strong proof/evidence of guilt and factual basis for each element of charge must exist even in negotiated plea, determined on a case-by-case analysis in the reasonable discretion of the Ct

St v Spears
147 Wis. 2d 429
(Ct. App. 1988)

- Factual basis of plea need not be established beyond a reasonable doubt
- Must include facts substantially negating Def's claim of innocence
- All exculpatory inferences need not be negated, but inculpatory inference must be reasonably drawn from facts shown

North Carolina v Alford
91 S. Ct. 160 (1970)
St v Johnson
105 Wis. 2d 657, 663
(Ct. App. 1981)

- Acknowledgment of truth of all facts essential to guilt not necessary to satisfy factual basis requirement

See Ernst v St
43 Wis. 2d 661 (1969)

c. An *Alford*-type plea is acceptable and does not violate *Ernst* requirement that Def admit guilt

North Carolina v Alford
91 S. Ct. 160 (1970)
St v Johnson
105 Wis. 2d 657
(Ct. App. 1981)

2) Def has right to enter *Alford* plea for strategic reasons, even though guilt not acknowledged

St v Smith
202 Wis. 2d 21 (1996)
Wis JI-Cr SM-32A

3) Ct should take greater pains than for non-*Alford* plea to be sure record reflects adequate factual basis for *Alford* plea

St v Salentine
206 Wis. 2d 419
(Ct. App. 1996)

4) It must be clear Def fully understands charge and effect of *Alford* plea

§ 971.31(10)
St v Riekkoff
112 Wis. 2d 119 (1983)
St v Olson
127 Wis. 2d 412
(Ct. App. 1985)

D. Conditional pleas with right to appeal adverse pretrial rulings not allowed except

1) For challenges to orders denying motions to suppress evidence, or

2) For challenge to admissibility of a statement

Note: Sec. 971.31(10) exceptions apply even if Def has pleaded guilty.

St v Kelty
2006 WI 101, ¶¶ 18, 52
294 Wis. 2d 62

4. General Rule: Guilty, No Contest, and *Alford* Pleas Waive All Nonjurisdictional Defects

A. Waived defects include constitutional claims

B. Rule is one of administration and does not involve power to address the issues raised

C. Double jeopardy waived unless violation is apparent from the record

CR 14: SUBSTITUTION OF JUDGE/RECUSAL

§ 971.20(2)

1. Substitution of Prelim Judge

§ 971.20(3)(a)

A. "Judge" includes Ct Comm'r

St v Holmes
106 Wis. 2d 31, 34 (1982)

B. No cause necessary for substitution

Sprang v St
63 Wis. 2d 679 (1974)

1) Def need not allege or demonstrate actual prejudice

C. Time and procedure for filing request

§ 971.20(3)(b)

1) Def may file written request with Ct at initial appearance, or

§ 971.20(3)(b)

2) Def may file written request with Clerk of Ct at least five days before prelim, unless Ct otherwise permits

D. Limitations

§ 971.20(3)(b)

1) Substitution of prelim Judge exhausts Def's right to substitution for duration of action

a. Except under § 971.20(7), allowing one additional substitution after appeal

2) Request for substitution may not name more than one Judge

St v Smith
106 Wis. 2d 17, 20 (1982)

3) Named Judge may not be assigned to other proceedings in same case once substituted

2. Substitution of Trial Judge

§ 971.20(2)
In re Rules of Crim Procedure: § 971.20, Stats,
110 Wis. 2d 242 (1983)
St v Holmes
106 Wis. 2d 31, 34 (1982)

A. No cause necessary for substitution

Sprang v St
63 Wis. 2d 679, 682–83 (1974)
St v Garner
54 Wis. 2d 100, 102–03 (1972)

1) Def need not allege or demonstrate actual prejudice

B. Time for filing request

§ 971.20(4)

1) Def or Def's Atty must file request before making any motions and before arraignment

St ex rel Mace v Cir Ct
193 Wis. 2d 208 (1995)

a. Judge is not Trial Judge until after bindover

2) If new Judge assigned and Def has not exercised right to substitution

§ 971.20(5)
St v Damaske
212 Wis. 2d 169 (Ct. App. 1997)
St ex rel Strong v Cir Ct
184 Wis. 2d 223 (Ct. App. 1994)

a. When new Judge assigned at least 20 days before trial, Def must file written request within 15 days after actual notice of assignment

§ 971.20(5)

b. When new Judge assigned within 20 days before trial, Def must file written request within 48 hours after actual notice

§ 971.20(5)

c. When new Judge assigned within 48 hours before trial, Def must make oral or written request before commencement of trial

St v Norwood
2005 WI App 218
287 Wis. 2d 679

d. Request must be filed before proceedings continue before newly assigned Judge

St v Wisth
2009 WI App 53
317 Wis. 2d 719

e. No right to substitution in postconviction proceedings

St v Bohannon
2013 WI App 87,
¶¶ 17–26,
349 Wis. 2d 368

3) Def who did not request substitution of Judge originally assigned, nor of Judge who replaced originally assigned Judge, does not have a renewed right to substitute when original Judge is reassigned to the case

4) Exceptions to filing deadline

St ex rel Tessmer v Cir Ct
123 Wis. 2d 439
(Ct. App. 1985)

a. Substitution request filed after arraignment but before Def or Def's Atty learns Trial Judge's identity not untimely so long as no unreasonable delay

St ex rel Tinti v Cir Ct
159 Wis. 2d 783
(Ct. App. 1990)

b. If intake system does not provide adequate formal notice in advance of arraignment of assignment of Trial Judge, statutory time limits for substitution must be extended

- Must allow Def intelligent opportunity to exercise right of substitution

St v Zimbal
2017 WI 59, ¶ 52
375 Wis. 2d 643

c. Strict compliance with 20-day deadline after remittitur is not required and request for substitution is timely if Def follows Judge's instruction not to file until Atty is appointed

C. Waiver of request for substitution

1) Failure to request substitution within time limits waives right to substitution of Judge

St v Hollingsworth
160 Wis. 2d 883
(Ct. App. 1991)

2) If Ct denies timely substitution request, further participation in pretrial proceedings waives right of substitution

St v Harrison
2015 WI 5
360 Wis. 2d 246

3) Once substitution is granted, doctrines of waiver and forfeiture no longer apply, even if case inadvertently reassigned to substituted Judge and Def does not object

D. Procedure

§ 971.20(4)

1) Written request required, except

§ 971.20(5)

a. When new Judge assigned within 48 hours before trial, Def may make oral request

§ 971.20(4)

2) Request must be filed with Clerk of Ct

§ 971.20(8)

a. Clerk to immediately contact named Judge for determination of whether request timely and in proper form

§ 971.20(8)

b. If no determination made within 7 days, clerk must forward request to Chief Judge of Judicial Administrative District for action

E. Judicial obligations

§ 971.20(8)

1) Named Judge must determine whether request timely and in proper form

Sprang v St
63 Wis. 2d 679, 683
(1974)
Baldwin v St
62 Wis. 2d 521 (1974)

2) Request may be denied if not filed in proper and timely manner

St ex rel James LJ v
Cir Ct for Walworth Cty
200 Wis. 2d 496 (1996)

a. Denial is reviewable by Chief Judge in District and Ct of Appeals

Barbara RK v James G
(Paternity of
Danielle LG)
2002 WI App 47
250 Wis. 2d 667

- Failure to seek review by Chief Judge will prevent appellate relief

3) If request timely and in proper form

§ 971.20(9)

a. Named Judge has no authority to act further in case, except

- To conduct initial appearance

- To accept plea

- To set bail

§ 971.20(8)

b. Clerk of Ct must request assignment of new Judge under § 751.03

§ 751.03(3)

c. Assignment of new Judge made by Chief Judge of Judicial Administrative District

St v Smith
106 Wis. 2d 17, 20 (1982)

4) Named Judge may not be assigned to other proceedings in same case once substituted

St v Austin
171 Wis. 2d 251
(Ct. App. 1992)

a. Absent written agreement of all parties

St v Tappa
2002 WI App 303
259 Wis. 2d 402

5) No obligation to advise Def that Judge was victim of similar crime previously

F. Limitations

§ 971.20(2), (7)

1) Def has right to only one substitution of Judge, except under § 971.20(7) allowing one additional substitution if Appellate Ct orders new trial or sentencing proceeding

St v Foley
153 Wis. 2d 748
(Ct. App. 1989)

a. No right of substitution when remand for new restitution hearing as condition of probation, because probation not a "sentence"

§ 971.20(2)

2) Request for substitution may not name more than one Judge

St v Beaty
57 Wis. 2d 531 (1973)

3) Judge may properly deny untimely request for substitution

4) Multiple Def actions

§ 971.20(6)

a. Only one substitution request available

§ 971.20(6)–Judicial
Council Note, 1981

b. All Defs must join in single request

St ex rel Garibay v
Kenosha Cty Circuit Ct
2002 WI App 164
256 Wis. 2d 438

- Applies to Defs not yet before the Ct

G. Reinstatement of Judge

§ 971.20(11)

1) Substituted Judge may be reinstated upon filing of agreement signed by all parties, substituted Judge, and new Judge

§ 971.20(11)
St v Austin
171 Wis. 2d 251
(Ct. App. 1992)

2) The action and all records must be transferred back to substituted Judge

H. Substitution following appeal

§ 971.20(7)
Rohl v St
97 Wis. 2d 514 (1980)

1) Request must be filed within 20 days after filing of remittitur in Trial Ct

2) If Def previously filed substitution request, additional request may be filed if Appellate Ct has ordered new trial or sentencing proceeding

St v Foley
153 Wis. 2d 748
(Ct. App. 1989)

a. New restitution hearing as condition of probation not part of sentencing proceeding

3. Sua Sponte Recusal by Judge

§ 757.19(2)
SCR 60.04(4)
St v Asfoor
75 Wis. 2d 411,
436 (1977)

A. Grounds for mandatory recusal

§ 757.19(2)(a)

1) Related to party, Atty, or spouse of either within third degree of kinship

St v Harrell
199 Wis. 2d 654 (1996)

a. If Judge's relative is government counsel, restriction applies only to Atty of record or any other Atty who participates in case

§ 757.19(2)(b)
ABA Stds—Special
Functions of Trial Judge
§ 6-1.9 (2000)

2) Judge is party or material witness

a. Unless Judge determines pleading purporting to make Judge a party is false

§ 757.19(2)(c)
Sturdevant v St
49 Wis. 2d 142,
145 (1970)

3) Judge has previously acted as Atty for party in same action now pending before Ct

§ 757.19(2)(d)

4) Judge prepared, as Atty, any legal instrument whose validity or construction at issue

§ 757.19(2)(e)

5) Appellate Judge has previously handled matter while Judge of lower Ct

§ 757.19(2)(f)

6) Judge has significant financial or personal interest in outcome

§ 757.19(2)(f)

a. Interest does not occur solely by Judge being member of political or taxing body that is party

§ 757.19(2)(g)
St v Walberg
109 Wis. 2d 96,
105 (1982)

7) Judge determines for any reason Judge cannot, or it appears Judge cannot, act impartially

St v Jones
181 Wis. 2d 194
(Ct. App. 1993)

a. Highly discretionary ground, which should be used with restraint

St v Harrell
199 Wis. 2d 654 (1996)
St v American TV
& Appliance
151 Wis. 2d 175,
183–84 (1989)
St v Santana
220 Wis. 2d 674
(Ct. App. 1998)

b. Judge's subjective determination: what exists in Judge's mind

Aetna Life Ins Co
v Lavoie
106 S. Ct. 1580,
1587 (1986)
Franklin v McCaughtry
398 F3d 955
(7th Cir 2005)

c. Judge's "own word" that Judge can be impartial is not sufficient, and Judge must recuse, if only reasonable inference from judge's extrajudicial conduct is actual bias

B. Judge's duties

1) Recusal required if any grounds in **Sec. 3.A.** above exist

§ 757.19(4)

2) Judge must recuse self immediately when learns of disqualifying facts

St v Marhal
172 Wis. 2d 491
(Ct. App. 1992)

a. Def must raise disqualifying facts as soon as alleged infirmity known

St v Walberg
109 Wis. 2d 96,
109 (1982)

3) Failure of Judge to recuse self subject to harmless-error rule

§ 757.19(6)

C. Sanctions for failure to recuse self

1) All legal remedies available in specific statutes

2) Referral to Judicial Commission of Wis Supreme Ct

§ 757.19(3)

D. Waiver of sua sponte recusal allowed, provided

1) All parties and Judge agree, and

2) Full and complete record of facts creating disqualification made

4. Recusal for Prejudice

A. Def may seek removal of Judge by motion to recuse for actual prejudice

Sprang v St
63 Wis. 2d 679 (1974)

1) Def must demonstrate actual prejudice in fact on part of Judge

St v Bell
62 Wis. 2d 534,
536 (1974)

2) Def has no right to hearing on date of trial, when

a. Def avers no facts of actual prejudice by Judge, only conclusory allegations, and

b. Def's right to substitution under § 971.20 has passed

B. Constitutional right to impartial and unbiased Judge

St v Pinno
2014 WI 74
356 Wis. 2d 106
St v Gudgeon
2006 WI App 143
295 Wis. 2d 189

1) Due process requires that no person be tried by Judge prejudiced against that person

   a. Subjective test—Judge's own determination of impartiality and

   b. Objective test—whether impartiality can reasonably be questioned

St v Gudgeon
2006 WI App 143
¶¶ 25–26,
295 Wis. 2d 189
St v Santana
220 Wis. 2d 674
(Ct. App. 1998)

Dressler v
Racine Cty Cir Ct
163 Wis. 2d 622, 644
(Ct. App. 1991)
see also St v Rodriguez
2006 WI App 163, ¶ 36,
295 Wis. 2d 801
remanded on other grounds (Wis 4/17/07)

2) "[N]ot all comments made by a judge during the course of the proceedings are grounds for disqualification. A trial judge may express his or her opinion about counsel's motions without being subject to recusal"

St v O'Neill
2003 WI App 73, ¶ 19,
261 Wis. 2d 534

3) Judge's prior adverse rulings or expressions of Judge's views of the law are not sufficient to demonstrate "personal" bias that requires recusal

St v McBride
187 Wis. 2d 409, 416–17
(Ct. App. 1994)

4) Party's support of Judge's opponent in previous election does not create personal bias, nor does mere fact that party filed disciplinary complaint against Judge, which did not result in discipline or public scrutiny, establish actual bias

St v Marcotte
2020 WI App 28, ¶¶ 39, 42, 392 Wis. 2d 183

5) Judge's presiding over both Def's treatment Ct proceedings and Def's sentencing after termination from program raises significant concerns regarding partiality

   a. Best practice is for different Judge to preside over Def's sentencing after termination

   b. If same Judge proceeds, comprehensive waiver should be used

CR 15: CHALLENGES TO SUFFICIENCY OF COMPLAINT/DOUBLE JEOPARDY

1. Timeliness of Motion Challenging Complaint

§ 971.31(5)(a)

A. Misdemeanor: Must be made within 10 days after initial appearance

§ 971.31(5)(c)

B. Felony: Must be made before preliminary examination

St v Koller
2001 WI App 253
248 Wis. 2d 259

C. Objection deemed waived if not timely made

2. Standards for Review of Sufficiency of Complaint

St v Bonds
161 Wis. 2d 605
(Ct. App.)
rev'd on other grounds
165 Wis. 2d 27 (1991)

A. Complaint that alleges no crime is void and gives Ct no jurisdiction

St v Archambeau
187 Wis. 2d 502
(Ct. App. 1994)

1) This jurisdictional defect not cured by guilty plea

St v Diehl
205 Wis. 2d 1
(Ct. App. 1996)

2) BUT when Def pleads guilty to deficient charge (missing element) pursuant to oral amendment and plea bargain, no jurisdictional defect

St v Hurley
2015 WI 35, ¶ 37
361 Wis. 2d 529
St ex rel Evanow
v Seraphim
40 Wis. 2d 223 (1968)

B. Complaint, within its 4 corners, must answer 5 "W's"

1) What is the charge?

2) Who is charged?

3) When and where?

4) Why is this particular person being charged?

5) Who says so and why should that person be believed?

§ 968.01, § 970.02(1)(a)

C. Complaint must contain "essential facts" constituting offense charged and possible penalty that may be imposed upon conviction

St v Moats
156 Wis. 2d 74 (1990)

1) Complaint may contain unconstitutionally obtained evidence to support probable cause

St v Blalock
150 Wis. 2d 688
(Ct. App. 1989)

D. Complaint must be minimally adequate based on common sense, not hypertechnical evaluation of essential facts establishing probable cause

St ex rel Cornellier
v Black
144 Wis. 2d 745
(Ct. App. 1988)

1) A practical, commonsense measure of plausibility of particular conclusions about human behavior

2) Conclusions or inferences drawn need only be sufficiently more than mere possibility

a. So that reasonable people would appropriately act on them in pragmatic affairs of everyday life

St v Ritchie
2000 WI App 136
237 Wis. 2d 664

3) Circumstantial evidence may form basis for complaint

St v Hurley
2015 WI 35, ¶ 26
361 Wis. 2d 529
St v Kempainen
2015 WI 32, ¶ 16
361 Wis. 2d 450

E. Complaint must contain sufficient information, reliably reported, together with reasonable inferences, that cause Ct to form reasonable belief that Def probably committed crime charged

St v Manthey
169 Wis. 2d 673, 688–89
(Ct. App. 1992)
St ex rel McCaffrey
v Shanks
124 Wis. 2d 216
(Ct. App. 1985)

F. If reasonable inference may be drawn establishing probable cause and equally reasonable inference to contrary, complaint sufficient

St ex rel Cullen v Ceci
45 Wis. 2d 432 (1970)

G. Fair-minded magistrate must conclude that facts and circumstances alleged justify further proceedings and charges not merely capricious

St v Elverman
2015 WI App 91, ¶ 18
366 Wis. 2d 169

H. Def must be able to determine

St v Chambers
173 Wis. 2d 237, 251
(Ct. App. 1992)

1) Whether complaint states offense to which Def able to plead and prepare defense, and

St v Kempainen
2015 WI 32, ¶ 17
361 Wis. 2d 450

2) Whether conviction or acquittal is bar to another prosecution for same charge

I. Reliability of information reported in complaint

§ 968.01

1) Information reported in complaint may be based on

a. Personal knowledge of complainant, or

b. Hearsay information given by complainant, or

c. Combination of both

Illinois v Gates
103 S. Ct. 2317 (1983)
St v Ritchie
2000 WI App 136
237 Wis. 2d 664
St v Wolske
143 Wis. 2d 175
(Ct. App. 1988)

2) Reliability of hearsay information must be shown under totality of circumstances

Illinois v Gates
103 S. Ct. 2317 (1983)

a. Judge must make balanced assessment of relative weights of all indicia of reliability (and unreliability) attending informant's tip

Illinois v Gates
103 S. Ct. 2317 (1983)
Jones v US
80 S. Ct. 725 (1960)

b. Standard of review for probable cause determinations is whether Judge had "substantial basis" for determination

c. "Totality of circumstances" test supersedes the "two-pronged test" under *Aguilar v Texas*, 84 S. Ct. 1509 (1964)

3) Specific types of informants

St v Paszek
50 Wis. 2d 619 (1971)

a. Unnamed, compensated police informants

- Reliability depends on record of past dealings and degree to which information proved reliable and trustworthy

Ruff v St
65 Wis. 2d 713 (1974)

b. Statements against penal interest

- Admitting own involvement deemed reliable unless it appears informant essentially attempting to exculpate self

St ex rel Warrender v Kenosha Cty Ct
67 Wis. 2d 333 (1975)

c. Law enforcement officer

- Deemed reliable and credible

St v Smaxwell
2000 WI App 112
235 Wis. 2d 230

- Non-eyewitness complainant can swear to reliability of unsworn eyewitness statement

St v Paszek
50 Wis. 2d 619 (1971)

d. Citizen informant

- Victim or witness to crime who aids law enforcement without expectation of gain or concession deemed reliable

Gelhaar v St
58 Wis. 2d 547 (1973)

4) Statements of accused

a. May be used in complaint for probable cause, even though inadmissible in evidence at trial because of *Miranda* violations

St v Clark
162 Wis. 2d 406
(Ct. App. 1991)

J. Ct has no inherent power to dismiss legally sufficient complaint absent statutory authorization, prosecutorial request, or constitutional violation

State v Rippentrop
2023 WI App 15
406 Wis. 2d 692
pet for rev denied

1) Ct has authority to order specific performance of nonprosecution agreement and dismiss complaint with prejudice

St ex rel Unnamed Petn'r v Cir Ct
157 Wis. 2d 157
(Ct. App. 1990)

K. Ct cannot substitute its judgment for that of DA as to appropriateness of charge

3. Specific Challenges to Complaint

A. Sufficiency of alleged time of offense

1) Criminal charge must be sufficiently stated to

St v Kempainen
2015 WI 32, ¶ 17
361 Wis. 2d 450

a. Allow Def to plead and prepare defense, and

St v Kaufman
188 Wis. 2d 485
(Ct. App. 1994)

- To charge a continuing violation, complaint must allege date when violation began

b. Bar second prosecution for same offense

St v Hurley
2015 WI 35, ¶ 34
361 Wis. 2d 529
St v Kempainen
2015 WI 32, ¶ 22
361 Wis. 2d 450

2) In sexual assault cases, time allegation need not be precise

St v Kempainen
2015 WI 32, ¶ 24
361 Wis. 2d 450
St v Fawcett
145 Wis. 2d 244
(Ct. App. 1988)

3) Factors in determining sufficiency of time allegation

a. Age and intelligence of victim and other witnesses

b. Surrounding circumstances

c. Nature of offense, including likelihood of its occurring at specific time or likelihood of being discovered immediately

d. Length of alleged period of time in relation to number of individual criminal acts alleged

e. Passage of time between alleged period of crime and Def's arrest

f. Duration between indictment and alleged offense

g. Ability of victim or complaining witness to state date and time of alleged offense with particularity

St v Kempainen
2015 WI 32, ¶ 28
361 Wis. 2d 450

h. Any other relevant factors

St v Stark
162 Wis. 2d 537
(Ct. App. 1991)

4) State has ethical duty to disclose information regarding time of alleged commission of offense

St v Scott
2017 WI App 40, ¶ 18
376 Wis. 2d 430

5) Ct applies statute in effect at the time of the last criminal action constituting a continuing offense

B. Element missing from complaint

St v Petrone
161 Wis. 2d 530 (1991)

1) Scienter not alleged

a. Citing number of correct substantive statute defining crime sufficient, so long as Def not prejudiced or misled by omission

St v Flakes
140 Wis. 2d 411
(Ct. App. 1987)

2) Typographical errors—amendment to conform to proof

§ 971.29(2)

a. Amendment to conform to proof may be allowed when not prejudicial to Def

b. If Def can understand charge from complaint sufficiently to prepare defense, amendment to correct mistaken statutory citation permissible

C. Repeater allegation and penalty enhancer

§ 973.12(1)
St v Gerard
189 Wis. 2d 505 (1995)
St v Williams
186 Wis. 2d 506
(Ct. App. 1994)
rev'd,

198 Wis. 2d 479 (1996)
St v Villarreal
153 Wis. 2d 323
(Ct. App. 1989)

1) Repeater allegations and penalty enhancer must be alleged in charging document to which Def pleads. Penalty enhancer must be supported by probable cause

St v Koeppen
195 Wis. 2d 117
(Ct. App. 1995)

a. Repeater: State proves at sentencing

St v Williams
190 Wis. 2d 1
(Ct. App. 1994)
rev'd on other grounds
198 Wis. 2d 516 (1996)

b. Enhancer: State proves as an element of the crime at trial

St v Squires
211 Wis. 2d 876
(Ct. App. 1997)

2) Charging document alleging repeater when predicate crime(s) occurred more than five years before new offense, need not allege period of incarceration

Mikrut v St
212 Wis. 2d 859
(Ct. App. 1997)

3) For purposes of repeater law, prior conviction is measured from date judgment of conviction entered, not date Def merely found guilty

§ 973.12(1)
St v Martin
162 Wis. 2d 883 (1991)

4) Charging document may not be amended to add repeater allegation after arraignment and entry of plea, except

St v Gerard
189 Wis. 2d 505 (1995)

a. May be amended post-plea to correct clerical error in sentence portion of penalty enhancement if Def is not prejudiced

St v Campbell
201 Wis. 2d 783
(Ct. App. 1996)

b. If original information alleges repeater status, information may be amended post-arraignment if sufficiency of notice to Def of his/her repeater status is unaffected

St v Larsen
177 Wis. 2d 835
(Ct. App. 1993)

5) Ct may grant State's post-plea motion to dismiss without prejudice to recharge with repeater allegation

§ 939.62(1)

6) Applies to present conviction for any crime

§ 939.12

a. "Crime" is prohibited conduct punishable by fine and/or imprisonment

St v Carpenter
179 Wis. 2d 838
(Ct. App. 1993)

b. Does not apply to punitive contempt

D. Multiplicity—Single offense charged in multiple counts—Two-prong test (*See* Sec. 5, *infra*)

St v Seymour
183 Wis. 2d 683 (1994)

E. Duplicity—Charging several distinct and separate offenses in a single count

St v Johnson
2001 WI 52
243 Wis. 2d 365
St v Elverman
2015 WI App 91
366 Wis. 2d 169
St v Chambers
173 Wis. 2d 237
(Ct. App. 1992)

1) EXCEPT as limited by prohibition against duplicity, State has discretion to charge Def who has engaged in a series of offenses that may be properly viewed as one continuing offense with

a. One continuous offense

b. A single offense

c. Series of single offenses

2) Duplicitous charges violate due process under 6th and 14th Amendments of US Constitution and article I, §§ 7 and 8, of Wis Constitution

3) Complaint duplicitous only if any of following dangers present and cannot be cured by jury instructions

a. Def may not be properly notified of charges

b. Def may be subjected to double jeopardy

c. Def may be prejudiced by evidentiary rulings at trial

d. Def may be deprived of right to unanimous jury verdict

St v Koeppen
2000 WI App 121
237 Wis. 2d 418
St v Hammer

216 Wis. 2d 214, 219
(Ct. App. 1997)

- Def entitled to unanimity with respect to ultimate issue of guilt or innocence, but unanimity not always required with respect to alternative ways in which crime can be committed

Jackson v St
92 Wis. 2d 1
(Ct. App. 1979)

- When alternative acts are charged in the disjunctive, so that each act is an independent offense, complaint is duplicitous because jury may not agree unanimously as to which alternative act(s) Def committed

Jackson v St
92 Wis. 2d 1
(Ct. App. 1979)
see also St v Seymour
183 Wis. 2d 683 (1994)

— EXAMPLE: The alternatives in the theft statute, § 943.20(1) (took and carried away, used, transferred, etc.), are independent offenses; they are not synonyms defining the single offense of theft

- Disjunctive pleading of alternative, practically indistinguishable acts defining a single crime is not duplicitous

Manson v St
101 Wis. 2d 413 (1981)

— EXAMPLE: The robbery statute, § 943.32(1), creates a single crime with two practically indistinguishable statutorily prohibited ways of being committed (use of force and threat of imminent use of force)

§ 948.01(6)
St v Lomagro
113 Wis. 2d 582 (1983)
St v McMahon
186 Wis. 2d 68
(Ct. App. 1994)

— EXAMPLE: The single "act" of sexual intercourse may be committed in several different ways in one continuous transaction

St v Seymour
183 Wis. 2d 683 (1994)

- Acts charged in conjunctive not duplicitous (but may be multiplicitous: *See* **Sec. 5** below)

St v Jacobsen
2014 WI App 13
352 Wis. 2d 409
St v Miller
2002 WI App 197
257 Wis. 2d 124

4) Determine single, continuous criminal transaction versus multiple discrete crimes by considering

a. Whether the multiple acts are "conceptually similar"

b. Time factors

- Occurred substantially same time

- One continuous transaction

c. Identity of actor(s) and victim(s)

St v Hammer
216 Wis. 2d 214, 219
(Ct. App. 1997)

d. "Does statute create only one offense with multiple modes of commission or does statute create multiple offenses defined by each distinct felony Def intended to commit?"

- Consider legislative intent using language of statute, legislative history, nature of proscribed conduct, and appropriateness of multiple punishments for conduct

St v Cleveland
2000 WI App 142
237 Wis. 2d 558

e. Were they separate volitional acts?

St v Lomagro
113 Wis. 2d 582 (1983)

5) If duplicitous, DA elects the act on which it relies or files separate counts

F. Vindictive Prosecution

US v Goodwin
102 S. Ct. 2485,
2488 (1982)

1) Due-process violation when the State retaliates against a person for exercising a statutory or constitutional right

St v Johnson
2000 WI 12
232 Wis. 2d 679

2) If Def establishes a realistic likelihood that vindictiveness exists, then a rebuttable presumption of prosecutorial vindictiveness applies

St v Cameron
2012 WI App 93, ¶ 13,
344 Wis. 2d 101

a. Filing of additional charges during the give-and-take of pretrial plea negotiations does not warrant a presumption of vindictiveness

Blackledge v Perry
94 S. Ct. 2098 (1974)

b. Presumption arises when prosecutor files more serious charges after Def appeals a conviction and wins a new trial

St v Johnson
2000 WI 12, ¶ 45,
232 Wis. 2d 679

3) If the presumption of vindictiveness is established, prosecutor may rebut with an explanation of objective circumstances that led to the additional charge

St v Johnson
2000 WI 12, ¶ 47,
232 Wis. 2d 679

4) If there is no presumption of vindictiveness, Def must establish actual prosecutorial vindictiveness

St v Cameron
2012 WI App 93, ¶ 14,
344 Wis. 2d 101

a. To establish actual vindictiveness, Def must show objective evidence that prosecutor acted to punish Def for standing on Def's legal rights

St v Williams
2004 WI App 56,
¶¶ 42–49,
270 Wis. 2d 761

b. No actual vindictiveness when prosecutor threatened Def with additional charges relating to separate incidents if Def insisted on trial on unrelated pending charges

G. Immunity from Prosecution in Overdose Cases

§ 961.443

1) An aider of someone who has overdosed or who the aider believes has overdosed under § 961.443(1) is immune from prosecution for possession of a controlled substance or a controlled substance analog under § 961.43(3g), drug paraphernalia under § 961.573, or a masking agent under § 961.69(2)

St v Williams
2016 WI App 82
372 Wis. 2d 365

2) Def has the burden to prove pretrial by a preponderance of the evidence entitlement to immunity

3) Once motion claiming immunity filed, Ct should make determination as to entitlement at its earliest opportunity. (Upon request, Ct should hold evidentiary hearing)

St v Lecker
2020 WI App 65
394 Wis. 2d 285

4) Immunity applies only if charge occurs under circumstances surrounding or leading to "rendering of aid"

5) Charges specified in § 961.443(2) must be dismissed

4. Motion to Dismiss Based on Critical Misstatements or Omissions in Complaint

Franks v Delaware
98 S. Ct. 2674 (1978)

A. Preconditions to holding hearing on motion

St v Mann
123 Wis. 2d 375 (1985)

1) Def must make offer of proof that

a. Untrue facts included in complaint or qualified facts omitted

- Misstatements or omissions must be identified

b. Because of misstatement or omission, complaint inadequate for probable cause

B. Standard of proof at hearing

1) Burden of proof on Def

2) Must show existence of misstatements or omitted facts by preponderance of evidence

C. No hearing required if

1) Probable cause exists if misstatements excised or omissions included

2) Omitted facts not critical, determinative, or undisputed facts with only single meaning

5. Double Jeopardy

St v Davison
2003 WI 89
263 Wis. 2d 145

A. Wis Supreme Ct accepts decisions of U.S. Supreme Ct as controlling interpretations of Double Jeopardy provisions of both U.S. and Wis Constitutions

City of Oshkosh
v Winkler
206 Wis. 2d 538
(Ct. App. 1996)

B. Def must establish double jeopardy violation beyond a reasonable doubt

C. Jeopardy attaches when:

§ 972.07(2)

1) Jury is empaneled and sworn

§ 972.07(1)

2) In Ct trial, when first witness is sworn

St v Comstock
168 Wis. 2d 915 (1992)

3) When Ct accepts plea

St v Henning
2004 WI 89

273 Wis. 2d 352

D. Double Jeopardy Clause protects against

1) Multiple punishments for same offense. *See* **Sec. 5.E.**, *infra*

St v Carpenter
197 Wis. 2d 252 (1995)
St v Stephens
201 Wis. 2d 82
(Ct. App. 1996)

a. Determination whether sanction is punishment under Double Jeopardy Clause rests on purpose actually served by statute, not underlying nature of proceeding giving rise to sanction

- When principal purpose is nonpunitive, action does not violate double jeopardy if punishment, retribution or deterrence are also present

City of Oshkosh v Winkler
206 Wis. 2d 538
(Ct. App. 1996)

- If principal purpose of regulation is punishment, retribution or deterrence, then that regulation is a sanction triggering double jeopardy protection

St v McMaster
206 Wis. 2d 30 (1996)

- No double jeopardy violation if civil sanction's principal purpose is remedial

St v Konrath
218 Wis. 2d 290 (1998)

- Civil vehicle forfeiture not double jeopardy

St v Robinson
2014 WI 35
354 Wis. 2d 351
St v Willett
2000 WI App 212
238 Wis. 2d 621

- Sentence modification/resentencing may constitute double jeopardy. See **CR 39**

St v Terry
2000 WI App 250
239 Wis. 2d 519

- Probation/parole revocation proceedings do not implicate double jeopardy

St v Gramza
2020 WI App 81,
¶¶ 27–29,
395 Wis. 2d 215

- Mandatory minimum sentence does not violate double jeopardy after completion of Substance Abuse Program (SAP)

2) Multiple prosecutions—after acquittal or conviction. *See* **Sec. 5.F.**, *infra*

St v Vassos
218 Wis. 2d 330 (1998)
St v Guzman
2001 WI App 54
241 Wis. 2d 310

a. Ct should also conduct collateral estoppel (issue preclusion) analysis established in *Ashe v Swenson*, 90 S. Ct. 1189 (1970)

St v Steinhardt
2017 WI 62, ¶ 14
375 Wis. 2d 712
St v Pal
2017 WI 44, ¶ 15
374 Wis. 2d 759

E. Multiplicity—Single offense charged in multiple counts—Two-prong test

939.66
St v Davison
2003 WI 89
263 Wis. 2d 145

1) First test—Multiplicitous if offenses charged are "identical in law and fact"

Blockburger v US
52 S. Ct. 180 (1932)
St v Dauer
174 Wis. 2d 418
(Ct. App. 1993)
St v Johnson
178 Wis. 2d 42
(Ct. App. 1993)

a. "Identical in law" (*Blockburger* "elements only") test

St v Anderson
219 Wis. 2d 739 (1998)
St v Vassos
218 Wis. 2d 330 (1998)
St v Dowe
197 Wis. 2d 848
(Ct. App. 1995)
rev'd on other grounds
207 Wis. 2d 129 (1997)

- Elements only test: Analysis involves side-by-side comparison of statutes, not facts of Def's activity. Does each offense require proof of an additional element/fact that the other does not?

St v Wise
2021 WI App 87
400 Wis. 2d 174

- Not multiplicitous when same act causes separate harm that is an element of offense

- To be lesser included, must be "utterly impossible" to commit the greater crime without committing the lesser

- Test applies to charges under same statute and to multiple charges under different sections

St v Warren
229 Wis. 2d 172

(Ct. App. 1999)
St v Davis
171 Wis. 2d 711
(Ct. App. 1992)
St v Kanarowski
170 Wis. 2d 504, 509
(Ct. App. 1992)

b. "Identical in fact" means proof of identical facts

St v Steinhardt
2017 WI 62, ¶ 23
375 Wis. 2d 712

- Similar facts relating to same legal element are not multiplicitous, if acts either separate in time or of significantly different nature in fact

St v Ziegler
2012 WI 73
342 Wis. 2d 256
St v Multaler
2002 WI 35
252 Wis. 2d 54

- A "time for reflection" or a "separate volitional act" is often significant, especially in sexual assault and possession of child pornography cases

St v Eaglefeathers
2009 WI App 2, ¶ 8
316 Wis. 2d 152

- "Identical in fact" depends upon whether one count requires proof of an additional fact that the other does not

St v Schultz
2020 WI 24
390 Wis. 2d 570

- Resolve ambiguous charging language in second pleading with reasonable person's understanding of allegations, considering the entire record

St v Pal
2017 WI 44, ¶ 27
374 Wis. 2d 759
St v Hartnek
146 Wis. 2d 188
(Ct. App. 1988)
Harrell v St
88 Wis. 2d 546
(Ct. App. 1979)

- When offense in question against persons rather than property, there are as many offenses as individuals affected

St v Davison
2003 WI 89
263 Wis. 2d 145
St v Beasley
2004 WI App 42, ¶ 7,
271 Wis. 2d 469

c. If offenses identical in law and fact, then presumption that legislature did not intend to punish same offense twice, absent clear indication of contrary legislative intent

St v Sauceda
168 Wis. 2d 486 (1992)
St v Beasley
2004 WI App 42, ¶ 7,
271 Wis. 2d 469

d. If offense different in law and fact, presumption that legislature intended to permit cumulative punishments, unless rebutted by clear legislative intent to the contrary

St v Jackson
2004 WI App 190,
276 Wis. 2d 697

e. Legislature intended to permit multiple punishments when conspirators agree to commit multiple crimes

St v Steinhardt
2017 WI 62, ¶ 14
375 Wis. 2d 712
St v Pal
2017 WI 44, ¶ 15
374 Wis. 2d 759
St v Davison
2003 WI 89, ¶¶ 43, 50
263 Wis. 2d 145
St v Kuntz
160 Wis. 2d 722,
756–57 (1991)

2) Second test: If presumption arises that legislature intended to permit multiple punishments, Ct must then determine whether there are other factors that **clearly indicate** contrary legislative intent, i.e., that "allowable unit of prosecution" for offense is to be only a single count

St v Patterson
2010 WI 130
329 Wis. 2d 599

a. Def has burden of overcoming presumption by proving contrary legislative intent

St v Davison
2003 WI 89
263 Wis. 2d 145
St v Multaler
2002 WI 35
252 Wis. 2d 54
St v Anderson
219 Wis. 2d 739 (1998)

b. Four factors Ct uses to assess legislative intent

- Statutory language

— See also if § 939.66 applies, precluding convictions of both greater offense and enumerated included crime(s)

- Legislative history and context

- Nature of proscribed conduct

St v Trawitzki
2000 WI App 205
238 Wis. 2d 795, *aff'd*
2001 WI 77
244 Wis. 2d 523

- Appropriateness of multiple punishments for conduct

St v Sauceda
168 Wis. 2d 486 (1992)

— Single act or course of conduct?

St v Eastman
185 Wis. 2d 405
(Ct. App. 1994)

— Are two grounds different enough to merit separate punishment?

— Were statutes meant to protect different interests of victim or public?

F. Multiple Prosecutions

St v Henning
2004 WI 89
273 Wis. 2d 352
St v Vassos
218 Wis. 2d 330 (1998)

1) Double Jeopardy Clause protects against

a. Prosecution of same offense after acquittal

Blockburger v US
52 S. Ct. 180 (1932)

- Apply *Blockburger* "same elements" test

- Issue preclusion (formerly known as collateral estoppel) (*See* **Sec. 5.G.** below). Analyze only if there is no violation of double jeopardy

b. Prosecution of same offense after conviction

c. Prosecution of same offense after declaration of mistrial under certain circumstances. *See* **CR 35** (Mistrial)

§ 939.71, § 961.45
US v Dixon
113 S. Ct. 2849 (1993)
St v Triebold
2021 WI App 13,
¶¶ 23–26,
396 Wis. 2d 176
St v Jacobs
186 Wis. 2d 219
(Ct. App. 1994)

2) Test: Does each offense contain an element not contained in the other? That is, does each crime require proof of a fact which the other does not?

a. If not, they are same offense and subsequent prosecution barred

- "Same elements" or *Blockburger* test applies

St v McKee
2002 WI App 148, ¶ 17,
256 Wis. 2d 547

b. If so, then necessary facts exception may apply

§ 938.39

3) Double jeopardy to criminally prosecute same matter previously adjudicated in Juv Ct

St v Everett
231 Wis. 2d 616
(Ct. App. 1999)
Craig SG v St
209 Wis. 2d 65
(Ct. App. 1997)

a. However, not double jeopardy to prosecute for same offense for which Juv Ct or institution imposed sanctions

St v Lawton
167 Wis. 2d 461
(Ct. App. 1992)

4) Double Jeopardy Clause of 5th Amendment no bar to felony prosecution when Def previously convicted of civil municipal traffic charge arising from same incident

a. Proceeding to enforce municipal ordinance is civil

b. Double Jeopardy Clause not implicated when one of two successive prosecutions is civil

US v Felix
112 S. Ct. 1377 (1992)

5) Prohibition for other acts generally does not implicate double jeopardy

St v James
169 Wis. 2d 490, 495–97
(Ct. App. 1992)

6) Use of prior felony conviction to prove both an element of current offense (e.g., felon possessing firearm) and repeater status does not violate double jeopardy prohibition

Currier v Virginia
138 S. Ct. 2144 (2018)

7) Double jeopardy does not preclude second trial when Def consents to have charges severed, even if Def was acquitted on a fact that is necessary to prosecution in second trial

St v Fonder
162 Wis. 2d 591
(Ct. App. 1991)
Garrity v Fiedler
850 F. Supp. 777

(E.D. Wis.), *aff'd*, 41 F3d
1150 (7th Cir 1994)

8) Criminal prosecution arising from same conduct that led to imposition of disciplinary measures by prison authorities does not violate double jeopardy prohibition

Witte v US
115 S. Ct. 2199 (1995)

9) Double Jeopardy Clause does not prevent subsequent prosecution or punishment for criminal activity that had been considered as a factor at sentencing for a different crime

US v Dixon
113 S. Ct. 2849 (1993)

10) Double jeopardy protection applies to punitive contempt proceedings

St v McMaster
206 Wis. 2d 30 (1996)

11) Sec. 343.305 administrative suspension is remedial civil sanction and not punishment for double jeopardy purposes

St v Konrath
218 Wis. 2d 290 (1998)

12) Civil motor vehicle forfeiture does not invoke double jeopardy

St v Terry
2000 WI App 250
239 Wis. 2d 519

13) Probation/parole revocation proceedings not dispositive

Smith v Massachusetts
125 S. Ct. 1129 (2005)

14) If Ct grants a motion for directed verdict at close of State's case, Ct cannot reverse decision and allow charge to go to jury without exposing Def to double jeopardy

15) See Chapter on **Mistrial**, **CR 35**

Ashe v Swenson
90 S. Ct. 1189 (1970)
St v Holland
87 Wis. 2d 567, 582
(Ct. App. 1979)
rev'd on other grounds
91 Wis. 2d 134 (1979)
St v Wille
185 Wis. 2d 673
(Ct. App. 1994)

G. Issue preclusion (formerly known as collateral estoppel)

St v Guzman
2001 WI App 54
241 Wis. 2d 310
St v Landrum
191 Wis. 2d 107
(Ct. App. 1995)

1) Double jeopardy prevents State from retrying in a subsequent prosecution any ultimate fact that was resolved in favor of Def at an earlier trial (or hearing if burden of proof or persuasion was same or greater)

St v Kasian
207 Wis. 2d 611

(Ct. App. 1996)

2) Factors that may bear on question of whether issue preclusion applies

a. Could the party against whom preclusion is sought, as a matter of law, have obtained review of the judgment?

b. Is the question one of law that involves two distinct claims or intervening contextual shifts in the law?

c. Do significant differences in the quality or extensiveness of proceedings between the two Cts warrant relitigation of the issues?

d. Have the burdens of persuasion shifted such that the parties seeking preclusion had a lower burden of persuasion in the first trial than in the second?

e. Are matters of public policy and individual circumstances involved that would render application of issue preclusion fundamentally unfair?

- Inadequate opportunity or incentive to obtain full and fair adjudication in the initial action

f. Two additional factors in assessing whether issue preclusion applies when prior proceeding is before administrative agency

- Whether agency was adjudicating a disputed fact issue properly before it

- Whether agency's proceedings provided parties adequate opportunity to litigate

3) If issue preclusion applies

a. Test: Ct reviews entire relevant record of prior proceeding to determine whether rational jury could have grounded its verdict upon an issue other than that Def claims was previously decided against State

b. Ct need not determine precise issue upon which acquittal rested unless process of elimination leads it finally to issue sought to be foreclosed from retrial

St v Vassos
218 Wis. 2d 330,
343 (1998)

c. Def has burden to demonstrate that issue in question was decided in first proceeding

Schiro v Farley
114 S. Ct. 783 (1994)
US v Gentile
816 F2d 1157, 1162
(7th Cir 1987)

St v Holland
87 Wis. 2d 567
(Ct. App. 1979)
rev'd on other grounds
91 Wis. 2d 134 (1979)

d. Cases suggest Def's burden is high—Ct to be able to determine with assurance that fact in issue was necessarily established by the earlier judgment

4) Double jeopardy is personal right

a. Cannot be in double jeopardy unless earlier placed in jeopardy

b. Therefore, Def cannot rely on accomplice's favorable issue resolution at his/her separate trial

St v West
181 Wis. 2d 792
(Ct. App. 1993)

H. Dual sovereignty doctrine permits one act that violates the laws of two states to be punished in both states

St v Hansen
2001 WI 53
243 Wis. 2d 328

1) Sec. 961.45 bars such prosecution in Wis for controlled substances violation when previous acquittal or conviction under law of another state

St v Bautista
2009 WI App 100
320 Wis. 2d 582

2) Sec. 961.45 does not bar prosecution for conspiracy in one jurisdiction and delivery in another if the acts involve different conduct

CR 16: SPEEDY TRIAL

1. Constitutional Protection

US Const amend VI

A. Federal authority

1) "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial…"

Wis Const art I, § 7

B. State authority

1) "In all criminal prosecutions the accused shall enjoy the right … to a speedy public trial…"

US v MacDonald
102 S. Ct. 1497 (1982)
St v Lemay
155 Wis. 2d 202 (1990)

C. Speedy trial concern attaches at time of arrest or when Def officially accused of crime, whichever occurs first

1) Earlier, pre-accusation, investigatory period governed by due process and statutes of limitation rather than speedy trial rights

St v Wilson
149 Wis. 2d 878 (1989)
St v Blanck
2001 WI App 288
249 Wis. 2d 364

a. To establish due-process violation, must show Def suffered actual prejudice and that delay due to improper motive

St v Urdahl
2005 WI App 191
286 Wis. 2d 476

2) If charges are dismissed and then filed again, speedy trial clock does not begin ticking until second filing, as long as Def is not under arrest or under any bail conditions

St v Allen
179 Wis. 2d 67
(Ct. App. 1993)

3) Includes right to speedy sentencing

Barker v Wingo
92 S. Ct. 2182 (1972)
cited in St v Lemay
155 Wis. 2d 202 (1990)

D. Determination of deprivation

1) To determine whether constitutional right to speedy trial has been denied, Ct must balance 4 factors

St v Urdahl
2005 WI App 191
286 Wis. 2d 476

a. Length of delay

Doggett v US
112 S. Ct. 2686 (1992)
St v Borhegyi
222 Wis. 2d 506, 510
(Ct. App. 1998)

- Post-accusation delay that approaches 12 months is presumptively prejudicial

Doggett v US
112 S. Ct. 2686 (1992)
St v Borhegyi
222 Wis. 2d 506, 510
(Ct. App. 1998)

- Necessary to inquire into 3 other factors only when delay is presumptively prejudicial

St v Leighton
2000 WI App 156
237 Wis. 2d 709

b. Reason for delay

St v Williams
2004 WI App 56, ¶ 41

270 Wis. 2d 761

- Def's request for or consent to adjournments may account for so much of alleged delay that Def cannot claim prejudice and Ct need not examine other factors

Vermont v Brillon
129 S. Ct. 1283 (2009)

- Delays sought by or caused by appointed counsel are attributed to Def

St v Provost
2020 WI App 21,
¶¶ 39–40,
392 Wis. 2d 262
pet for rev denied

— "Systemic breakdown" exception: If delay results from systemic breakdown (problems that are both institutional in origin and debilitating in scope) in public defender system, such delay may be attributed to State

St v Lock
2013 WI App 80
348 Wis. 2d 334

- Delay caused by refusal of federal authorities to produce Def in state Ct for trial is neutral

c. Def's assertion of right, and

d. Prejudice to Def

Day v St
61 Wis. 2d 236 (1973)

- Fourth consideration in ad hoc determination (prejudice to Def) requires inquiry into 3 interests of Def

— Whether there has been pretrial incarceration

— Whether Def suffered anxiety or concern during the elapsed time, and

— Whether possibility that defense will be impaired was limited

St v Lemay
155 Wis. 2d 202 (1990)

2) Because evidence of prejudice speculative until after trial, "a *pretrial* determination that speedy trial rights have been violated can only be made when the evidence shows extraordinary circumstances justifying dismissal with prejudice"

US v MacDonald
98 S. Ct. 1547 (1978)

3) Pretrial determination of speedy trial violation cannot be made, because the merits of speedy trial claims are intertwined with the merits of the case-in-chief, and a pretrial determination would be premature, absent a showing of extraordinary circumstances

Recommendation

4) Absent a showing of extraordinary circumstances, proceeding with trial will not compound any deprivation suffered and a determination of speedy trial violation may properly be made after trial

Barker v Wingo
92 S. Ct. 2182 (1972)
St v Borhegyi
222 Wis. 2d 506
(Ct. App. 1998)

E. Remedy for violation of constitutional right to speedy trial: Charges are dismissed

2. Statutory Protection

A. Misdemeanor

§ 971.10(1)

1) Within 60 days after initial appearance

B. Felony

§ 971.10(2)(a)

1) Within 90 days from date trial demanded by a party in writing or on record

§ 971.10(2)(a)

a. If demand in writing, copy must be served upon opposing party

§ 971.10(2)(a)
St v Adams
207 Wis. 2d 568
(Ct. App. 1996)

b. Demand cannot be made until after filing of information or indictment

§ 971.10(2)(b), § 751.03

2) If Ct unable to schedule within 90 days, Ct must request assignment of another Judge

St ex rel Rabe v Ferris
97 Wis. 2d 63 (1980)

3) Stay of proceedings directed to lower Ct tolls running of time period for speedy trial

C. Continuance

§ 971.10(3)(a)

1) Ct can order continuance on own motion or motion of any party, only if

§ 971.10(3)(a)
St ex rel Rabe v Ferris
97 Wis. 2d 63 (1980)

a. Justice served by granting continuance would outweigh interest of public and Def in speedy trial, *and*

§ 971.10(3)(a)

b. Ct sets forth oral or written reasons that granting continuance would serve greater justice than granting speedy trial

§ 971.10(3)(b)

2) Factors Ct must consider when determining whether to grant continuance include

§ 971.10(3)(b)1.

a. Whether failure to grant would likely make continuation of proceeding impossible or result in miscarriage of justice, or

§ 971.10(3)(b)2.

b. Whether case as a whole is so unusual and complex it is unreasonable to expect adequate preparation within required time frames

§ 971.10(3)(b)3.

c. Interests of victim(s)

§ 971.10(3)(c)

3) Ct may not grant continuance because of calendar congestion, lack of diligent preparation, or State's failure to obtain witnesses

D. Waiver

Hatcher v St
83 Wis. 2d 559 (1978)

1) Guilty plea waives any objections grounded on right to speedy trial

St v Miller
2003 WI App 74
261 Wis. 2d 866

2) Speedy trial may be waived by Def discharging lawyer shortly before trial

E. Remedy for violation of statutory right to speedy trial

§ 971.10(4)

1) Release from custody but not from obligations of bond pending trial

2) Violation does not authorize dismissal nor reversal of conviction after trial

3. Interstate Detainers

A. Created by detainer statutes. *See* CR 44

CR 17: PERSONAL JURISDICTION/PLACE OF TRIAL

PERSONAL JURISDICTION

Walberg v St
73 Wis. 2d 448,
458 (1976)

1. Personal Jurisdiction Depends on Physical Presence Before Court

St v Monje
109 Wis. 2d 138,
144–45 (1982)

Walberg v St
73 Wis. 2d 448,
458 (1976)
St v Washington
120 Wis. 2d 654
(Ct. App. 1984)
aff'd
134 Wis. 2d 108 (1986)

A. Physical presence pursuant to

1) Properly issued warrant or summons based on probable cause, or

2) Lawful arrest, based on probable cause, or

3) Voluntary appearance

St v Waldoch
121 Wis. 2d 476 (1984)

a. In response to summons

St v Smith
131 Wis. 2d 220 (1986)
St ex rel Zdanczewicz
v Snyder
131 Wis. 2d 147 (1986)
St v Monje
109 Wis. 2d 138,
146–47 (1982)

B. However, unlawful arrest does not deprive Trial Ct of personal jurisdiction

Cty of Riverside v McLaughlin
111 S. Ct. 1661 (1991)
St v Golden
185 Wis. 2d 763
(Ct. App. 1994)

1) Unlawful *Riverside* detention does not affect jurisdiction

St v Moats
156 Wis. 2d 74 (1990)
St v Smith
131 Wis. 2d 220 (1986)

C. Essential element of personal jurisdiction is sufficiency of complaint, not validity of arrest

DWB v St
(In Int of DWB)
152 Wis. 2d 395
(Ct. App. 1989)
aff'd
158 Wis. 2d 398 (1990)

D. Purposes served by personal jurisdiction

1) To give notice to person that an action has been commenced, and

2) To confer authority of Ct over the person

E. If initial appearance conducted on record by telephone or live audiovisual means, Def may waive physical appearance

1) Without waiver, all grounds for challenging Ct's personal jurisdiction survive

2) Waiver must be on record

§ 971.19

F. Fact that crime committed outside Wis is fatal to personal jurisdiction of Ct

St v Brown
2003 WI App 34
260 Wis. 2d 125

1) May be fact issue for jury

St v Stefanovic
215 Wis. 2d 310
(Ct. App. 1997)

G. Ct has no jurisdiction after a proper discharge from probation even if not all Ct-ordered conditions have been fulfilled

H. See Issuing Warrants/Subpoenas, CR 6, this volume, for discussion of probable cause to arrest

2. Challenge to Personal Jurisdiction of Court

A. Objection must be preserved

B. Entry of plea without reserving objection waives following attacks on personal jurisdiction

1) Sufficiency of complaint in misdemeanor action

Wold v St
57 Wis. 2d 344 (1973)

2) Sufficiency of prelim

Logan v St
43 Wis. 2d 128 (1969)

3) Holding prelim beyond statutory time limits

St v Russo
70 Wis. 2d 169 (1975)

4) Sufficiency of information, unless information fails to charge a crime known to law

a. Ct then lacks subject-matter jurisdiction

St v Webb
160 Wis. 2d 622 (1991)

5) Post-trial or post-plea discovered defects in prelim are not fatal to personal jurisdiction

Armstrong v St
55 Wis. 2d 282 (1972)

C. Felonies

1) Objections to personal jurisdiction made before prelim must be reasserted at arraignment or be deemed waived

St v Bonds
161 Wis. 2d 605
(Ct. App.)
rev'd on other grounds
165 Wis. 2d 27 (1991)

2) Guilty plea waives defects in complaint or in prelim bindover

St v Robles
157 Wis. 2d 55
(Ct. App. 1990)
aff'd
162 Wis. 2d 883 (1991)

D. Def waives right to claim loss of personal jurisdiction if Def selects course of action that causes defects in jurisdiction

1) When Ct approved request for co-signed bond, which was never signed, and prelim not commenced within 10 days after initial appearance, Def could not challenge jurisdiction of Ct

St v Horton
151 Wis. 2d 250
(Ct. App. 1989)

E. Statutory time limits for commencement of prelim do not apply or affect jurisdiction of Ct after remittitur from interlocutory appeal

PLACE OF TRIAL

1. Venue

A. Venue, generally

§ 971.19(1)
St v Anderson
2005 WI 54
280 Wis. 2d 104

1) Criminal actions shall be tried in Cty where offense committed

St v Anderson
2005 WI 54, ¶ 22 n.5
280 Wis. 2d 104

2) State must prove venue beyond a reasonable doubt

§ 971.19(2)
St v Elverman
2015 WI App 91, ¶ 38
366 Wis. 2d 169

3) If continuous offense alleged, venue is appropriate in any Cty in which one of the alleged acts occurred

St v Mendoza
80 Wis. 2d 122,
145 (1977)
Wis JI—Cr 267

4) In all criminal prosecutions, Def entitled to have case tried in Cty where offense committed

5) Exceptions

§ 971.19

a. When criminal offense relates to more than one Cty and constitutes special factual situation within § 971.19

§ 971.22

b. When Def successfully moves for change of venue under § 971.22

§ 971.19(8)

c. Charge of interference with custody of a child may be tried in Cty where crime committed or Cty of lawful residence of child

§ 971.19(12)
St v Jensen
2010 WI 38
324 Wis. 2d 586

d. Charge of certain election and campaign violations in Cty where Def resides

§ 971.22(1)
Sheppard v Maxwell
86 S. Ct. 1507 (1966)
McKissick v St
49 Wis. 2d 537 (1971)

B. Def has constitutional and statutory right to change of venue when community prejudice will make fair trial impossible

St v Bangert
131 Wis. 2d 246 (1986)

1) Venue not a question of personal or subject-matter jurisdiction

RMC Form GF-120

2. Change of Place of Trial

St v Hereford
224 Wis. 2d 605
(Ct. App. 1999)

A. Decision to move to change place of trial is tactical decision under control of defense counsel

B. Timeliness

§ 971.22(1)

1) Motion must be made at arraignment, except

§ 971.22(1)

2) Motion may be made after arraignment for cause

C. Form and contents

§ 971.22(2)

1) Must be in writing

§ 971.22(2)

2) Must be supported by affidavit, stating

§ 971.22(2)

a. Evidentiary facts showing nature of prejudice alleged

St ex rel Hussong v Froelich
62 Wis. 2d 577, 593 (1974)

b. More than vague allegations of improper and prejudicial pretrial publicity

§ 971.22(2)

3) State may file counter-affidavits

D. Def's burden of proof

Sheppard v Maxwell
86 S. Ct. 1507 (1966)
Rideau v Louisiana
83 S. Ct. 1417 (1963)
Tucker v St
56 Wis. 2d 728 (1973)

1) Def must establish reasonable likelihood that community prejudice will make fair trial impossible

a. Def must present more than vague allegations of improper and prejudicial pretrial publicity

St v Kramer
45 Wis. 2d 20 (1969)

b. Def must present evidence of community sentiment against Def

St ex rel Hussong v Froelich
62 Wis. 2d 577, 593 (1974)

c. Def need not prove actual prejudice

Briggs v St
76 Wis. 2d 313 (1977)

2) When reasonable likelihood that fair trial cannot be had, doubt should be resolved in favor of Def

E. Test for granting motion

Holland v St
87 Wis. 2d 567 (1979)

1) Motion addressed to sound discretion of Ct

Thomas v St
53 Wis. 2d 483 (1972)

a. Discretion guided by constitutional requirements that Def entitled to fair trial

§ 971.22(3)
Sheppard v Maxwell
86 S. Ct. 1507 (1966)
Tucker v St
56 Wis. 2d 728,
733 (1973)

2) Ct must grant motion when reasonable likelihood that community prejudice will make fair trial impossible

St v Ritchie
2000 WI App 136
237 Wis. 2d 664

3. Factors to Be Considered by Court When Motion for Change of Place of Trial Made

St v Hebard
50 Wis. 2d 408,
426 (1971)

A. Inflammatory nature of publicity

Briggs v St
76 Wis. 2d 313 (1977)

1) Objectionable news reports are those that attempt to influence public opinion against Def

Hoppe v St
74 Wis. 2d 107 (1976)

2) Objective information and non-editorial reporting not objectionable

Turner v St
76 Wis. 2d 1 (1977)

3) Reflective, noninflammatory editorials not objectionable

St v Pheil
152 Wis. 2d 523
(Ct. App. 1989)

B. Degree to which adverse publicity permeated area from which jury panel would be drawn

St v Hebard
50 Wis. 2d 408,
426 (1971)

C. Jurors' familiarity with publicity

Irvin v Dowd
81 S. Ct. 1639 (1961)
Tucker v St
56 Wis. 2d 728,
735 (1973)

1) Jurors need not be totally ignorant of facts and issues involved

Skilling v US
130 S. Ct. 2896 (2010)
Thomas v St
53 Wis. 2d 483,
492 (1972)

2) Informed jury not necessarily a prejudiced jury

St v Hebard
50 Wis. 2d 408,
426 (1971)

D. Timing and specificity of publicity in relationship to time of trial

Tucker v St
56 Wis. 2d 728,
735 (1973)

1) Prejudicial effect of publicity wanes with passage of time

St v Hebard
50 Wis. 2d 408,
426 (1971)

E. Degree of State participation in dissemination of publicity

St v Hebard
50 Wis. 2d 408,
427–28 (1971)

F. Publication of inadmissible information

Holland v St
87 Wis. 2d 567
(Ct. App. 1979),
rev'd on other grounds,
91 Wis. 2d 134 (1979)

G. Severity of offense

St v Pheil
152 Wis. 2d 523
(Ct. App. 1989)

H. Degree of care exercised in voir dire by Def

1) Utilization of challenges available to Def, both peremptory and for cause

St v Hebard
50 Wis. 2d 408,
426 (1971)

I. Degree of care exercised and amount of difficulty in selecting jury

McKissick v St
49 Wis. 2d 537,
545 (1971)

J. Availability of less drastic remedies

St ex rel Hussong
v Froelich
62 Wis. 2d 577,
591 (1974)

1) Extensive voir dire

Sheppard v Maxwell
86 S. Ct. 1507 (1966)

2) Continuance of trial

3) Sequestration of jury

§ 971.22
Comment

K. Check district rules for practical considerations in changing place of trial

4. Consequences of Granting Motion

§ 971.22(3)

A. Trial may be held in Cty where fair trial can be had

1) Trial Judge selects new Cty

Sanders v St
69 Wis. 2d 242 (1975)

2) Def cannot choose new Cty for trial

§ 971.22(3)

3) Only one change of venue may be granted under § 971.22

§ 971.225(1)

B. Or, jury selected from another Cty in lieu of change of venue, provided

§ 971.225(1)(a)

1) Jurors will be sequestered

§ 971.225(1)(b)

2) Grounds for change of venue exist

§ 971.225(1)(c)

3) Cost to original Cty will be less than cost of holding trial in second Cty

C. If Ct elects to choose jury from another Cty

§ 971.225(2)

1) After jury has been selected in second Cty, proceedings held in original Cty

§ 971.225(2)

2) Original Cty must reimburse second Cty for costs under § 814.22

§ 971.22(3)

D. Judge ordering change of venue must preside at trial

§ 971.22(3)

E. Pretrial preliminary matters may be conducted in either Cty

1) Within discretion of Judge

§ 971.22(3)

F. Judge must decide in which Cty Def to be held, if Def in custody

§ 971.22(3)

G. Judge must decide in which Cty record to be kept

St v Bangert
131 Wis. 2d 246 (1986)

H. Once change of venue granted, Ct may change place of trial more than once

5. Renewing Motion for Change of Place of Trial

A. Def may reassert motion if reasonable probability of community prejudice has developed

St v Nutley
24 Wis. 2d 527,
566 (1964)

B. Another change of place of trial is required when fair trial cannot be had in second Cty

CR 18: MOTION FOR JOINDER (CONSOLIDATION) OR SEVERANCE

Jung v St
32 Wis. 2d 541, 545
(1966)

1. General Principles of Joinder and Severance Essentially the Same

St v Leach
124 Wis. 2d 648, 671
(1985)
St v Hall
103 Wis. 2d 125, 141
(1981)

A. Ct must balance potential prejudice of joinder with considerations of judicial administration

Jung v St
32 Wis. 2d 541, 546
(1966)
US v Echeles,
352 F2d 892, 896
(7th Cir 1965)

1) Right of Def to fair trial must be overriding consideration

Holmes v St
63 Wis. 2d 389 (1974)

2) Valid public interest exists to avoid duplications of time-consuming trials involving same factual situations

2. Joinder of Crimes

Francis v St
86 Wis. 2d 554, 558
(1979)
St v Hoffman

106 Wis. 2d 185, 208
(Ct. App. 1982)

A. Sec. 971.12(1) to be construed broadly in favor of initial joinder

B. Joinder at charging stage

1) More than one crime may be charged in same complaint or information, provided § 971.12(1)

a. Crimes charged of same or similar character

St v Davis
2006 WI App 23
289 Wis. 2d 398
St v Locke
177 Wis. 2d 590
(Ct. App. 1993)
St v Hamm
146 Wis. 2d 130
(Ct. App. 1988)

- Crimes must be same type of offenses occurring over relatively short period of time and evidence as to each must overlap

St v Holt
128 Wis. 2d 110, 118
(Ct. App. 1985)
St v Hoffman
106 Wis. 2d 185, 208
(Ct. App. 1982)

- Crimes not of same or similar character simply because same statutory violation

St v Hamm
146 Wis. 2d 130
(Ct. App. 1988)

- No per se rule on when time period between similar offenses so great they may not be joined

§ 971.12(1)
St v Bellows
218 Wis. 2d 614
(Ct. App. 1998)

b. Crimes charged based on same act or transaction

§ 971.12(1)
St v Salinas
2016 WI 44, ¶¶ 42–46
369 Wis. 2d 9

c. Crimes charged based on two or more acts or transactions that are connected together or constitute parts of common scheme or plan

Considerations include (but are not limited to):

- Closely related charges

- Common factors of substantial importance
- Whether one charge arose from another
- Whether crimes close in time and place or involved same victim(s)
- Similar manner, scheme, or plan
- Whether one crime committed to prevent punishment for another crime
- Whether joinder serves the goals of the statute

§ 971.12(1)

2) If misdemeanor joined with felony charge, case tried in Ct with jurisdiction to try felony charge

St v Leach
124 Wis. 2d 648, 671
(1985)

3) Misjoinder in some cases may be harmless error

C. Consolidation for trial

§ 971.12(4)

1) Ct may order two or more separate complaints or informations tried together, provided

a. Crimes and Def(s) could have been joined in single complaint or information

b. Standards permitting joinder at charging stage met

§ 971.12(4)

2) Trial procedure same as if prosecution under single complaint or information

3) Objections to consolidation

Jung v St
32 Wis. 2d 541, 547
(1966)

a. Grounds for objection should be stated

b. Objections should be supported by affidavits

3. Severance of Crimes

§ 971.12(3)
St v Holmes
63 Wis. 2d 389 (1974)
St v Bellows
218 Wis. 2d 614
(Ct. App. 1998)

A. If joinder proper under § 971.12, Def has burden of proving prejudice to Def in order to gain severance

§ 971.12(3)

1) Ct may order separate trials of counts, or

St v Bettinger
100 Wis. 2d 691 (1981)

a. Ct to balance prejudice to Def against interest of public in conducting joint trial on multiple counts

St v Prescott
2012 WI App 136, ¶ 13,
345 Wis. 2d 313

b. Prejudice must be substantial to rebut presumption of proper joinder

St v Wolske
143 Wis. 2d 175
(Ct. App. 1988)

c. Ct can order severance to prevent confusion when charges similar or burden of proof confusing

St v Johnston
178 Wis. 2d 20
(Ct. App. 1993)
rev'd on other grounds
184 Wis. 2d 794 (1994)

d. Ct can use jury instruction to inform of distinct burdens of proof

§ 971.12(3)

2) Ct may provide whatever relief justice requires

B. Prejudice to Def

Drew v US
331 F2d 85, 88
(DC Cir 1964)

1) Can result from jury hearing incriminating evidence not admissible in separate trials

a. Unless evidence of each crime simple and distinct and confusion or cumulative effect minimal

St v Hall
103 Wis. 2d 125 (1981)

b. Consider prophylactic instruction that evidence on one crime may not be used in determining guilt on other

St v Denny
120 Wis. 2d 614, 620
(Ct. App. 1984)

c. Tactics of counsel

Bailey v St
65 Wis. 2d 331, 346
(1974)

US v Quinn
365 F2d 256
(7th Cir 1966)

2) Can result from jury using evidence cumulatively

St v Locke
177 Wis. 2d 590
(Ct. App. 1993)

a. Consider bad acts evidence under § 904.04(2)

b. Evidence on any one charge might not persuade jury of Def's guilt, but sum of evidence may convince jury of guilt on all charges

Cross v US
335 F2d 987
(DC Cir 1964)

3) Can result from Def's inability to testify on one count without being cross-examined on count Def did not want to testify about

Holmes v St
63 Wis. 2d 389, 398
(1974)

a. Def must make convincing showing that Def has important testimony to offer regarding one count and strong need to refrain from testifying on other

St v Nelson
146 Wis. 2d 442
(Ct. App. 1988)

b. Def must present enough information to show claim of prejudice genuine and to enable Ct to weigh "economy and expedition of judicial administration" against Def's interest in having free choice to testify

St v Hamm
146 Wis. 2d 130
(Ct. App. 1988)

c. Supreme Ct has refused to adopt rule that severance mandatory whenever Def decides to selectively testify on some but not all properly joined charges

C. No prejudice to Def need be shown if charging document joins offenses that should not be joined under statute

D. Severance not required if:

Holmes v St
63 Wis. 2d 389, 397
(1974)

1) Charges "so inextricably intertwined … as to make proof of one crime impossible without proof of the other"

St v Locke
177 Wis. 2d 590, 596–99
(Ct. App. 1993)

2) Evidence would be admissible as "other acts" if there were separate trials

St v Denny
120 Wis. 2d 614, 618
(Ct. App. 1984)

E. Standard for review is erroneous exercise of discretion by Trial Ct

Currier v Virginia
138 S. Ct. 2144 (2018)

F. If acquitted, Def who consented to severance cannot assert issue preclusion in second trial

4. Joinder of Defendants

§ 971.12(2)
St v King
120 Wis. 2d 285, 291
(Ct. App. 1984)

A. Two or more Defs may be charged in same complaint or information if alleged to have participated in same act or transaction or series of acts or transactions constituting one or more crimes

1) Defs may be charged in one or more counts

2) All Defs need not be charged in each count

St ex rel Nickl v Beilfuss
15 Wis. 2d 428 (1962)

B. Can be tried together in Ct's sound discretion, if alleged offenses arise out of same transaction provable by same evidence

5. Severance of Defendants

A. Mandatory severance

§ 971.12(3)
Samia v US
143 S. Ct. 2004 (2023)
Bruton v US
88 S. Ct. 1620 (1968)

1) When DA advises Ct before trial of intent to use statement of co-Def that implicates another Def in crime charged

Richardson v Marsh
107 S. Ct. 1702 (1987)
Pohl v St
96 Wis. 2d 290, 300–01
(1980)

a. Unless Ct orders deletion of portions of statement that implicate Def

Pohl v St
96 Wis. 2d 290, 301
(1980)

- Such deletions are permissible alternative to mandatory severance

Samia v US
143 S. Ct. 2004 (2023)
St v Mayhall
195 Wis. 2d 53
(Ct. App. 1995)

- If requested by nontestifying co-Def, Ct must give limiting jury instruction that confession may be used only against co-Def who made it

Pohl v St
96 Wis. 2d 290, 301
(1980)

- Such practice furthers expeditious Ct administration

St v Nieves
2017 WI 69, ¶ 2
376 Wis. 2d 300

b. If statement of co-Def is nontestimonial under *Crawford v. Washington* (e.g., statement to jail informant), then no mandatory severance under *Bruton*

St v Cartagena
40 Wis. 2d 213 (1968)

2) *Bruton* rule does not apply to accomplice's admission, when

a. Accomplice not co-Def, and

b. Accomplice takes stand as alibi witness and is cross-examined regarding admission

§ 971.12(3)

B. Discretionary severance

St v Nutley
24 Wis. 2d 527, 543
(1964)
Pollack v St
215 Wis. 200 (1934)

1) When there are antagonistic defenses

a. When defense of one Def, if successful, mandates conviction of other

Jung v St
32 Wis. 2d 541, 546
(1966)

b. Def should not be forced to meet attacks of both prosecutor and co-Def

Zafiro v US
113 S. Ct. 933 (1993)

c. Mutually antagonistic defenses not prejudicial per se

d. Severance should be granted if serious risk that joint trial would compromise specific trial right of one of Defs or prevent jury from making reliable judgment about guilt or innocence

e. Cts can use less drastic means, such as cautionary instruction, to cure prejudice

St v Nutley
24 Wis. 2d 527, 543
(1964)

2) When entire line of evidence relevant to liability of only one Def may be treated as evidence against all Defs by jury, merely because Defs tried jointly

St v Patricia M
168 Wis. 2d 724
(Ct. App. 1992),
rev'd on other grounds,
176 Wis. 2d 542 (1993)

a. If severance not granted in an "entire line of evidence" case, cautionary instruction must be given. Trial Ct duty-bound to give such cautionary instruction regardless of whether Def requests one or not

US v Echeles
352 F2d 892
(7th Cir 1965)

3) When Def unable to call a co-Def as witness for purpose of getting co-Def's prior statements, which tend to exculpate Def, because co-Def exercises right to remain silent

St v Rundle
166 Wis. 2d 715
(Ct. App. 1992)

4) When Def fails to move for severance, any claim of prejudicial joinder waived

C. Severance during trial itself

St v Nutley
24 Wis. 2d 527, 544
(1964)

1) May be ordered during trial if course of events running to prejudice of some co-Defs

2) Def must claim prejudice because of atmosphere of hostility generated by conduct of co-Def's Atty in Ct

DeLuna v US
308 F2d 140
(5th Cir 1962)

3) Co-Def Atty's comment to jury regarding Def's failure to testify at trial, grounds for severance

St v DiMaggio
49 Wis. 2d 565 (1971)

4) Option of Judge when substantial amount of evidence being developed as to one Def only

a. Order severance at that time

b. Give jury cautionary instruction that evidence against one Def may not be treated as evidence against another simply because Defs being tried at same time

6. Trial Practice Option

St v Avery
215 Wis. 2d 45
(Ct. App. 1997)

A. Trial Judge may wish to consider conducting one trial with totally separate juries for each severed Def

1) District Ct Administrator to handle jury logistics

2) Substantial time and expense savings as well as reduction of witness inconvenience possible

CR 19: SUPPRESSION—SEARCH AND SEIZURE

1. Warrant Requirement

US Const amend IV
Wis Const art 1, § 11

A. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized

St v Payano-Roman
2006 WI 47
290 Wis. 2d 380
St v Cameron
2012 WI App 93, ¶ 23,
344 Wis. 2d 101

1) Applies only to governmental searches, not private searches

St v Johnson
2013 WI App 140
352 Wis. 2d 98

2) May apply when foreign officials conduct searches targeting American citizens in foreign countries

Coolidge v
New Hampshire
91 S. Ct. 2022 (1971)
Katz v US
88 S. Ct. 507 (1967)

3) Search conducted without prior approval of Judge is per se unreasonable

St v Johnston
184 Wis. 2d 794 (1994)

4) Burden is on State to demonstrate warrantless search or seizure fell within exceptions

Wong Sun v US
83 S. Ct. 407 (1963)
Mapp v Ohio
81 S. Ct. 1684 (1961)

5) Exclusionary rule generally requires suppression of evidence obtained through illegal police conduct

St v Burch
2021 WI 68, ¶¶ 16–17
398 Wis. 2d 1

a. Exclusionary rule is employed after weighing the police misconduct to be deterred with the societal cost of suppression

b. Police conduct must be sufficiently deliberate that exclusion can meaningfully deter it

B. Exceptions to suppression—Suppression not required if

Brewer v Williams
97 S. Ct. 1232 (1977)
St v Starke
81 Wis. 2d 399 (1978)

1) State learned of evidence from independent source

Alderman v US
89 S. Ct. 961 (1969)

a. Once Def makes prima facie showing of illegality, government must prove independent source by preponderance of evidence

St v Silverstein
2017 WI App 64, ¶ 19
378 Wis. 2d 42

b. Tip from agency with duty to report is not an anonymous tip

Utah v Strieff
136 S. Ct. 2056 (2016)
St v Artic
2010 WI 83
327 Wis. 2d 392
St v Phillips
218 Wis. 2d 180 (1998)
St v Anderson
165 Wis. 2d 441 (1991)
St v Rogers
2008 WI App 176
315 Wis. 2d 60

2) Illegal police conduct sufficiently attenuated. Factors to consider:

a. Temporal proximity of misconduct and statements/consent/seizure of evidence

b. Presence of intervening circumstances

c. Purpose/flagrancy of the official misconduct

St v Jackson
2016 WI 56
369 Wis. 2d 673

3) Evidence would have been discovered inevitably

St v Marquardt
2005 WI 157
286 Wis. 2d 204
St v Eason
2001 WI 98
245 Wis. 2d 206

St v Johnson
2013 WI App 140
352 Wis. 2d 98

4) Police reasonably rely on warrant issued by neutral magistrate, but later find warrant to be invalid and

a. Process used to obtain warrant included significant investigation, and

b. Review by police officer trained and knowledgeable in requirements of probable cause and reasonable suspicion, or

c. Review by knowledgeable governmental Atty

St v Scull
2015 WI 22, ¶ 23
361 Wis. 2d 288
St v Dearborn
2010 WI 84
327 Wis. 2d 252
St v Littlejohn
2010 WI 85
327 Wis. 2d 107
St v Ward
2000 WI 3
231 Wis. 2d 723

5) Police search and/or seizure relying in objective good faith on then applicable case law, and case law later changes

St v Guzy
134 Wis. 2d 399 415
(Ct. App. 1986), *aff'd in part, rev'd in part*
139 Wis. 2d 663 (1987)

6) After stop, Def freely consents to search

St v Baudhuin
141 Wis. 2d 642 (1987)

7) Police subjectively relied on incorrect exception and search was otherwise legal

Hudson v Michigan
126 S. Ct. 2159 (2006)

8) Police violate "knock-and-announce" rule

Herring v US
129 S. Ct. 695 (2009)
St v Rogers
2008 WI App 176
315 Wis. 2d 60

9) Police conduct alleged as grounds for suppression was merely negligent, nonrecurring, and attenuated from arrest, *not* deliberate

St v Rogers
2008 WI App 176
315 Wis. 2d 60

10) Errors in warrant were mere "technical irregularities"

New York v Harris
110 S. Ct. 1640 (1990)
St v Felix
2012 WI 36
339 Wis. 2d 670

11) Evidence seized outside home after unlawful entry into home if police had probable cause to arrest before unlawful entry

2. Procedure

§ 971.31(5)(a)

A. Motion to suppress must be made within 10 days after initial appearance in misdemeanor or within 10 days after arraignment in felony

§ 971.31(5)(b)

1) In felony, motion must be made after information filed; not at prelim

§ 971.31(2)

2) If motion not made before trial, deemed waived unless Def shows surprise at State's possession of evidence

St v Radder
2018 WI App 36,
¶¶ 10–16,
382 Wis. 2d 749

B. Hold an evidentiary hearing only if Def's motion presents more than conclusory allegation and shows factual dispute

St v Zamzow
2017 WI 29
374 Wis. 2d 220

C. Right to confrontation does not apply during suppression hearing

D. Ct should make findings of fact and conclusions of law on record after pretrial evidentiary hearing

3. Use of Suppressed Evidence

James v Illinois
110 S. Ct. 648 (1990)
Walder v US
74 S. Ct. 354 (1954)

A. Otherwise inadmissible physical evidence may be used to impeach Def's trial testimony under limited circumstances

St v Garcia
2020 WI App 71
394 Wis. 2d 743
aff'd by equally divided ct
2021 WI 76
399 Wis. 2d 324

B. Otherwise inadmissible statement of Def, if made voluntarily, may be used to impeach Def at trial. *See* CR 21, Sec. 1.C.

St v Rush
147 Wis. 2d 225

(Ct. App. 1988)

C. Evidence suppressed at trial may be relied on at sentencing

4. Expectation of Privacy (Standing)

Bond v US
120 S. Ct. 1462 (2000)
Smith v Maryland
99 S. Ct. 2577 (1979)
St v Bruski
2007 WI 25
299 Wis. 2d 177
St v Stevens
123 Wis. 2d 303 (1985)
St v Sigarroa
2004 WI App 16
269 Wis. 2d 234

A. Ct must answer 2-part question

1) Whether individual, by his/her conduct, has exhibited actual expectation of privacy

2) Whether individual's expectation of privacy is one that society is prepared to recognize as reasonable

Rawlings v Kentucky
100 S. Ct. 2556 (1980)
St v Whitrock
161 Wis. 2d 960 (1991)

B. Def has burden of showing legitimate expectation of privacy

US v Padilla
113 S. Ct. 1936 (1993)
St v Fillyaw
104 Wis. 2d 700 (1981)
US v Payner
100 S. Ct. 2439 (1980)
Rakas v Illinois
99 S. Ct. 421 (1978)
Alderman v US
89 S. Ct. 961 (1969)
Katz v US
88 S. Ct. 507 (1967)

C. Expectation must be that of Def (not co-Def, co-conspirator, or 3rd party)

D. Situations in which Ct has recognized expectation of privacy

St v Ramirez
228 Wis. 2d 561
(Ct. App. 1999)

1) Addressee of package mailed, but not yet delivered

St v Earl
2009 WI App 99
320 Wis. 2d 639

a. However, no expectation of privacy in a package addressed to a fictitious person at a vacant apartment

Minnesota v Olson
495 US 91 (1990)
St v Curbello-Rodriguez
119 Wis. 2d 414, 424
(Ct. App. 1984)

2) Overnight apartment guest

Byrd v US
138 S. Ct. 1518 (2018)
St v Dixon
177 Wis. 2d 461 (1993)

3) Driver of a borrowed vehicle, including a rental car borrowed from the renter

St v Harris
206 Wis. 2d 243 (1996)

4) Automobile passengers challenging legality of stop

St v West
185 Wis. 2d 68 (1994)

5) Person living with probationer or parolee

St v Bowers
2023 WI App 4
405 Wis. 2d 716

6) Private cloud storage account even if created using work email

E. Factors to consider in determining expectation of privacy

1) Possession of item or area searched

US v Salvucci
100 S. Ct. 2547 (1980)
St v Wisumierski
106 Wis. 2d 722 (1982)

a. Def may have possession, yet no legitimate expectation of privacy

St v Knight
2000 WI App 16
232 Wis. 2d 305

2) Person's exercise of dominion and control over the property

Katz v US
88 S. Ct. 507 (1967)

3) Right to exclude others

Jones v US
80 S. Ct. 725 (1960)

4) Def's own right of access

St v Yakes
226 Wis. 2d 425
(Ct. App. 1999)

5) Others' right of access

6) Precautions taken to maintain privacy

California v Greenwood
108 S. Ct. 1625 (1988)

7) Subjective expectation of freedom from governmental intrusion

Katz v US
88 S. Ct. 507 (1967)
St v Guy
172 Wis. 2d 86 (1992)

8) Whether society recognizes expectation as objectively reasonable

9) Property interest in place searched

US v Martinez-Fuerte
96 S. Ct. 3074 (1976)

10) Whether privacy claim consistent with historical notions of privacy

F. Electronic data and devices

Kyllo v US
121 S. Ct. 2038 (2001)
St v Loranger
2002 WI App 5
250 Wis. 2d 198

1) If device is used to explore details of a private home that would previously have been unknowable without a physical intrusion, 4th Amendment protections apply

US v Jones
132 S. Ct. 945, 949 (2012)

2) Attachment of a GPS device to a vehicle and its use to monitor vehicle movements is a search, and a warrant is required

St v Pinder
2018 WI 106
384 Wis. 2d 416

a. GPS tracking warrant is issued under Ct's inherent authority and not per statute

St v Sveum
2010 WI 92
328 Wis. 2d 369

3) Order authorizing installation and monitoring of GPS tracking device on vehicle constitutes a valid warrant

St v Brereton
2013 WI 17
345 Wis. 2d 563

4) Warrantless seizure of vehicle to secure GPS warrant and install GPS device was based on probable cause, and GPS technology used did not exceed scope of warrant

Riley v California
134 S. Ct. 2473 (2014)

5) Warrant required to search information stored on a cell phone seized incident to arrest

Carpenter v US
138 S. Ct. 2206 (2018)

6) Warrant required to obtain personal location information, such as cell tower records

St v Bowers
2023 WI App 4
405 Wis. 2d 716

7) Warrant required to search cloud storage account even when created using non-private email

G. Privacy interest depends on place searched

California v Greenwood
108 S. Ct. 1625 (1988)
Hester v US
44 S. Ct. 445 (1924)
US v Akin
562 F2d 459
(7th Cir 1977)
Molina v St
53 Wis. 2d 662 (1972)

1) Abandoned or vacated property

St v Stevens
123 Wis. 2d 303, 319
(1985)
St v Yakes
226 Wis. 2d 425
(Ct. App. 1999)

a. Test is whether Def relinquished interest in property so no legitimate expectation of privacy when searched or no steps taken to privatize commercial enterprise

Friedman v US
347 F2d 697, 704
(8th Cir 1965)

b. Abandonment is ultimate fact or conclusion, based on combination of act and intent

2) Public view

Katz v US
88 S. Ct. 507 (1967)
Lewis v US
87 S. Ct. 424 (1966)
St v Davidson
44 Wis. 2d 177 (1969)

a. Not subject to 4th Amendment protection if knowingly exposed to public, even in own home or office

3) Curtilage

Hester v US
44 S. Ct. 445 (1924)
Ball v St
57 Wis. 2d 653 (1973)

a. 4th Amendment protection extends to house and its curtilage

St v Wilson
2022 WI 77, ¶ 20
404 Wis. 2d 623

b. Curtilage is determined by four factors:

- Proximity of area claimed to be curtilage to the home,
- Whether area is included within an enclosure surrounding the home,
- Nature of uses to which the area is put, and
- Steps taken by the resident to protect the area from observation by people passing by

St v Davis
2011 WI App 74
333 Wis. 2d 490

c. Attached garage is part of curtilage and uninvited police entry violates 4th Amendment

Collins v Virginia
138 S. Ct. 1663 (2018)

d. Part of driveway not generally used by visitors may be curtilage

St v Wilson
2022 WI 77, ¶¶ 21–34
404 Wis. 2d 623
Florida v Jardines
133 S. Ct. 1409 (2013)

e. "Knock and talk" investigation may allow entry into curtilage without constitutional violation

- Not confined to front doors or porches
- In limited fact-specific situations, may extend to alternative approaches to the house
- If invitation or license to approach exists

St v Dumstrey
2016 WI 3
366 Wis. 2d 64

f. Warrantless pursuit of OWI suspect into parking garage of apartment complex did not violate 4th Amendment, because parking garage was not curtilage

Florida v Jardines
133 S. Ct. 1409 (2013)

g. Warrant required for canine sniff of curtilage, including front porch

4) Open fields

Hester v US
44 S. Ct. 445 (1924)
Ball v St
57 Wis. 2d 653 (1973)

a. 4th Amendment protection extends to house and its curtilage, but not to open fields

Conrad v St
63 Wis. 2d 616 (1974)
St v Verhagen
86 Wis. 2d 262
(Ct. App. 1978)

b. State must prove open fields exception and Def must prove expectation of privacy of item located in curtilage open to public

California v Ciraolo
106 S. Ct. 1809, 1817
(1986)
St v Grawien
123 Wis. 2d 428, 436
(Ct. App. 1985)

c. Area open to view from above, even if a "focused observation," retains no expectation of privacy from aerial surveillance even if within curtilage

St v Peck
143 Wis. 2d 624
(Ct. App. 1988)

- Use of binoculars to spot marijuana growing on farm curtilage did not violate expectation of privacy

Dow Chem Co v US
106 S. Ct. 1819, 1824
(1986)
Florida v Riley
109 S. Ct. 693 (1989)

b. Warrantless aerial photographs from public air space not a search

5) No legitimate expectation of privacy in

St v Garcia
195 Wis. 2d 68
(Ct. App. 1995)

a. Automobile exterior

Bell v Wolfish
99 S. Ct. 1861 (1979)

b. Penal institutions

US v Tierney
448 F2d 37
(9th Cir 1971)

c. Foreign countries

St v Weide
155 Wis. 2d 537 (1990)

d. Custodial inventory searches

St v Betterley
191 Wis. 2d 406 (1995)

e. Property properly held in police inventory

St v Starke
81 Wis. 2d 399 (1978)

f. Public records

Griffin v Wisconsin
107 S. Ct. 3164 (1987)
St v Jones
2008 WI App 154
314 Wis. 2d 408

g. Rooms or residences occupied by individuals on probation, parole, or extended supervision

St v Amos
153 Wis. 2d 257
(Ct. App. 1989)

h. Homes occupied by escapees

St v Weber
163 Wis. 2d 116 (1991)

i. Cassette tape left in unlocked car

St v Roberts
196 Wis. 2d 445
(Ct. App. 1995)

j. Vehicle abandoned by Def fleeing scene of arrest

Minnesota v Carter
119 S. Ct. 469 (1998)

k. Apartment temporarily utilized by non-renter invitee to conduct illegal business activities

St v Eskridge
2002 WI App 158
256 Wis. 2d 314
St v Trecroci
2001 WI App 126
246 Wis. 2d 261

l. Common areas of some apartment buildings

St v Orta
2003 WI App 93
264 Wis. 2d 765

m. Shared public restroom stall (in limited circumstances)

Isaiah B v St
(In Int of Isaiah B)
176 Wis. 2d 639 (1993)

n. Student lockers

St v Baric
2018 WI App 63
384 Wis. 2d 359

o. Files shared publicly on a P2P (peer-to-peer) network

Coolidge v
New Hampshire
91 S. Ct. 2022 (1971)

H. Private search vs. government search

St v Jenkins
80 Wis. 2d 426 (1977)

1) 4th Amendment protection applies only to actions by governmental officials, not by private persons acting on own initiative

Walter v US
100 S. Ct. 2395 (1980)

2) Government may not expand privately conducted search without warrant or consent

St v Rogers
148 Wis. 2d 243
(Ct. App. 1988)

3) Def must prove by preponderance of evidence that private party was acting as governmental agent

5. Challenges to Warrants

A. Challenge to truthfulness of affidavits in support of issuance of warrants

Franks v Delaware
98 S. Ct. 2674 (1978)

1) Under limited circumstances, Def may attack truthfulness of warrant affidavit

a. Def makes a substantial preliminary showing that affidavit contains false statements that were knowingly, intentionally, or recklessly made, and

b. Def shows that magistrate could not have found probable cause, but for the false or untrue information

2) If both criteria are met, Def then entitled to evidentiary hearing at which Def must prove Def's allegations by preponderance of evidence before suppression is required

St v Marshall
92 Wis. 2d 101 (1979)

3) Hearing required only when affiant, not witness or informant, makes allegedly false statements

St v Stank
2005 WI App 236,
288 Wis. 2d 414

4) Mere desire to cross-examine does not justify an evidentiary hearing

B. Defective warrants

St v Noll
116 Wis. 2d 443 (1984)

1) Defect in warrant may invalidate only portion of warrant

St v Eason
2001 WI 98
245 Wis. 2d 206
St v Scull
2014 WI App 17
352 Wis. 2d 733
aff'd, 2015 WI 22
361 Wis. 2d 288

2) Defective warrant may not require suppression if State shows

a. Police relied on warrant issued by independent magistrate, and

b. Process used to obtain warrant included significant investigation and review either by police officer trained and knowledgeable in requirements of probable cause and reasonable suspicion, or by knowledgeable governmental Atty

St v Tye
2001 WI 124
248 Wis. 2d 530

3) Warrant issued pursuant to unsigned affidavit is defective, and evidence seized pursuant to it must be suppressed

St v Moeser
2022 WI 76, ¶ 28
405 Wis. 2d 1
cert denied
143 S. Ct. 2612 (2023)

4) No rigid requirements or magic words for oath; purpose of oath or affirmation is to impress upon swearing individual appropriate sense of obligation to tell truth

St v Jackson
2008 WI App 109
313 Wis. 2d 162

5) Warrant to search "duplex" must present probable cause to search particular unit or probable cause to search entire building

C. Issuance by unauthorized person

St v Grawien
123 Wis. 2d 428
(Ct. App. 1985)

1) Fruits of search warrant are subject to suppression, if magistrate was not authorized to issue warrants

St v McBride
187 Wis. 2d 409
(Ct. App. 1994)

2) Def must demonstrate bias of issuing magistrate by preponderance of evidence

Illinois v Gates
103 S. Ct. 2317 (1983)
St v Romero
2009 WI 32
317 Wis. 2d 12
St v Ward
2000 WI 3
231 Wis. 2d 723
St v DeSmidt
155 Wis. 2d 119 (1990)

D. Motion to suppress challenging probable cause

1) Challenger bears burden of demonstrating that evidence before issuing magistrate was clearly insufficient

2) "Great deference" paid to issuing magistrate's decision

St v Ritchie
2000 WI App 136
237 Wis. 2d 664

3) Deferential standard applies to both search warrants and arrest warrants issued based on allegations recited in criminal complaint

St v Casarez
2008 WI App 166
314 Wis. 2d 661
St v Sloan
2007 WI App 146
303 Wis. 2d 438

4) Affidavit in support of a warrant to search a home must establish probable cause to believe that a nexus exists between the items sought and the residence to be searched

St v Carroll
2008 WI App 161
314 Wis. 2d 690, *aff'd*,
2010 WI 8
322 Wis. 2d 299

5) Officer may answer calls on a cell phone seized incident to arrest, and information learned during calls may be used to secure warrant

St v Simmons
220 Wis. 2d 775
(Ct. App. 1998)

E. Warrant may be based on illegally obtained information if causal connection between information and warrant so attenuated as to dissipate taint

6. Warrant Execution Issues

A. General rules on execution of warrant

St v Avery
2011 WI App 124, ¶ 18
337 Wis. 2d 351

1) "One warrant, one search," but exception permitted for subsequent entry and search when (a) 2nd entry is a continuation of the 1st search and (b) decision to enter again is reasonable under the circumstances

§ 968.15(1), § 968.17(1)

2) A search warrant not executed within 5 days after issuance is void and is grounds for suppression

St v Meier
60 Wis. 2d 452
(1973)

3) Failure to return warrant within 48 hours after execution is not grounds for suppression

St v Edwards
98 Wis. 2d 367 (1980)

4) Delay in execution (within 5-day period) impermissible if facts essential to issuance dissipate

St v Drachenberg
2023 WI App 61
409 Wis. 2d 738
pet for rev denied

5) Forensic analysis of devices seized is not part of the warrant's 5-day execution period

a. Ct must determine if probable cause continued to exist at time of execution irrespective of reasons for delay

b. Def bears burden of proof

St v Pinder
2018 WI 106
384 Wis. 2d 416

c. GPS tracking warrant does not seek documents or data under the control of the vehicle owner and is not subject to the execution and return provisions of §§ 968.15 and 968.17(1)

Illinois v McArthur
121 S. Ct. 946 (2001)

6) Warrantless entry or temporary seizure to secure premises will not result in suppression if information sufficient for warrant already in hand and warrant issued short time later

§ 968.14
St v Suits
73 Wis. 2d 352 (1976)

7) Necessary force may be used to gain entry or execute warrant

Wilson v Arkansas
115 S. Ct. 1914 (1995)
St v Watkinson
161 Wis. 2d 750
(Ct. App. 1991)

8) Absent exigent circumstances, police must knock, announce presence and purpose, and allow those within to voluntarily open door

Richards v Wisconsin
117 S. Ct. 1416 (1997)
St v Larson
215 Wis. 2d 155
(Ct. App. 1997)
St v Stevens
213 Wis. 2d 324
(Ct. App. 1997)
summarily aff'd and remanded
217 Wis. 2d 369 (1998)

9) "No-knock" entry permitted if police have reasonable suspicion based on specific and articulable facts that announcing their presence will endanger their safety or permit destruction of evidence

St v DeSmidt
151 Wis. 2d 324
(Ct. App. 1989)
rev'd on other grounds
155 Wis. 2d 119 (1990)

10) Overbroad warrant may not be saved by exercise of discretion in execution

St v Stevens
181 Wis. 2d 410 (1994)

11) Execution of search warrant may be effectuated by ruse

St v O'Brien
214 Wis. 2d 328
(Ct. App. 1997)
aff'd, 223 Wis. 2d 303
(1999)

12) Warrant for search of premises may permit search of vehicles owned or controlled by owner

Ybarra v Illinois
100 S. Ct. 338 (1979)

B. Search of individuals on premises during warrant execution

§ 968.16
Bailey v US
133 S. Ct. 1031 (2013)
Michigan v Summers
101 S. Ct. 2587 (1981)
St v Guy
172 Wis. 2d 86 (1992)
St v Kolp
2002 WI App 17
250 Wis. 2d 296

1) No probable cause needed to detain persons on the premises during warrant execution so long as the detention is in the immediate vicinity

St v Hayes
196 Wis. 2d 753
(Ct. App. 1995)

2) Warrants may direct search of "all occupants" of a residence, if presence of likely guilty persons demonstrated to a reasonable probability

St v Andrews
201 Wis. 2d 383 (1996)

3) Officers may search visitor's belongings, if they are plausible repositories of objects of search and are neither worn by nor in physical possession of visitor at time of search

St v Ehnert
160 Wis. 2d 464
(Ct. App. 1991)

C. Evidence underlying warrant must not be stale

Richards v Wisconsin
117 S. Ct. 1416 (1997)
St v Watkinson
161 Wis. 2d 750
(Ct. App. 1991)

D. "No-knock" warrant may be issued if specific evidence of danger presented

1) Search is reasonable under 4th Amendment even if police dispense with rule of announcement and execute no-knock entry when

a. Police have reasonable belief that announcement of police presence would endanger safety of police or others, or

b. Police have reasonable belief that unannounced entry is required to prevent destruction of evidence

St v Berry
174 Wis. 2d 28
(Ct. App. 1993)

c. Announcement would be futile

Richards v Wisconsin
117 S. Ct. 1416 (1997)

2) There is no blanket "drug house" exception to the "knock and announce" rule

St v Stevens
217 Wis. 2d 369 (1998)
aff'g 213 Wis. 2d 324
(Ct. App. 1997)
St v Meyer
216 Wis. 2d 729 (1998)

3) While officer's general information regarding drug transactions may not be sufficient to support a no-knock warrant, basis may be established by evidence of officer's training and experience in conjunction with particular facts of case

St v Henderson
2001 WI 97
245 Wis. 2d 345
St v Whiting
2003 WI App 101
264 Wis. 2d 722

4) Irrespective of whether search warrant authorizes no-knock entry, reasonableness not determined at time warrant issued but when executed

St v LaCount
2008 WI 59
310 Wis. 2d 85

E. Items not particularized in search warrant may be seized if

1) Evidence discovered during lawful search, and

2) Evidence, with facts known to officer before search, provides connection between evidence and criminal activity, and

3) Evidence discovered within area properly designated in warrant, and

4) Evidence discovered while officer searching for objects particularized in warrant

LeClair v Hart
800 F2d 692
(7th Cir 1986)

F. Dictating contents of documents outside scope of warrant into tape recorder is a seizure

7. Searches Pursuant to Arrest Warrants

A. Execution of arrest warrants at residences of third parties (when search warrant is/is not required)

Payton v New York
100 S. Ct. 1371, 1388
(1980)
St v Blanco
2000 WI App 119
237 Wis. 2d 395

1) Police may enter dwelling to serve warrant only when there is reason to believe suspect resides there and is present within

Steagald v US
101 S. Ct. 1642 (1981)
St v Kiper
193 Wis. 2d 69 (1995)

2) Absent consent or exigent circumstances, search warrant is required to enter an individual's home in order to execute arrest warrant for 3rd party believed to be present there

St v Delap
2018 WI 64
382 Wis. 2d 92

B. Absent hot pursuit, consent, or exigent circumstances, warrant required for home entry to effectuate routine felony arrest

St v Lee
97 Wis. 2d 679
(Ct. App. 1980)

C. Def, mistakenly arrested on warrant naming another person, cannot suppress evidence if officer acted in good faith

St v Kiper
193 Wis. 2d 69 (1995)

D. Simple belief that subject of arrest warrant is present in home of third person is not sufficient to justify warrantless search of that home

8. Exceptions to Warrant Requirement

A. General Principles

Arkansas v Sanders
99 S. Ct. 2586 (1979)
US v Jeffers
72 S. Ct. 93 (1951)
St v Johnston
184 Wis. 2d 794 (1994)
St v Verhagen
86 Wis. 2d 262, 265 (1978)

1) Burden on government to justify appropriate exception to warrant requirement

Bell v Wolfish
99 S. Ct. 1861 (1979)
St v Flynn
92 Wis. 2d 427, 445
(1979)

a. Test of reasonableness under 4th Amendment requires balance of need for search against invasion of personal rights search entails

St v Stevens
173 Wis. 2d 290
(Ct. App. 1992)
aff'd in part, rev'd in part
181 Wis. 2d 410 (1994)

b. Judge should consider scope of intrusion, manner in which conducted, justification, and place where conducted

Agnello v US
46 S. Ct. 4 (1925)
Laasch v St
84 Wis. 2d 587, 594
(1978)
St v Monahan
76 Wis. 2d 387 (1977)

2) Mere belief that article sought concealed in residence will not justify warrantless search, notwithstanding facts showing probable cause

Mincey v Arizona
98 S. Ct. 2408 (1978)
Coolidge v
New Hampshire
91 S. Ct. 2022 (1971)

3) Reach of each exception limited to what is necessary to meet identified needs of society

Kentucky v King
131 S. Ct. 1849, 1858
(2011)

4) Warrantless entry based on exigent circumstances is reasonable when police did not create exigency by engaging or threatening to engage in conduct violating 4th Amendment

St v Smith
131 Wis. 2d 220, 228
(1986)
St v Bourgeois
2022 WI App 18,
¶¶ 17–19, 28
401 Wis. 2d 489
pet for rev denied

5) Warrantless entry because of exigent circumstances requires urgent need to enter coupled with insufficient time to get a warrant

St v Robinson
2010 WI 80, ¶ 30
327 Wis. 2d 302
St v Parisi
2014 WI App 129
359 Wis. 2d 255

6) Four factors have been identified that, when measured against time needed to obtain warrant, constitute exigent circumstances required for warrantless home entry

Lange v California
141 S. Ct. 2011 (2021)
St v Weber
2016 WI 96
372 Wis. 2d 202
(plurality)

a. Arrest made in "hot pursuit" on a case-by-case analysis

b. Threat to safety of suspect or others

c. Risk that evidence would be destroyed, and

d. Likelihood that suspect would flee

St v Dalton
2018 WI 85, ¶¶ 44–54,
383 Wis. 2d 147

7) Exigent circumstances for a warrantless blood draw can arise because of chaotic circumstances associated with major traffic crashes (*See* **TR 1, Sec. 12.B.**10))

Illinois v Caballes
125 S. Ct. 834 (2005)
St v Arias
2008 WI 84
311 Wis. 2d 358

8) A "drug dog" sniff does not constitute a search

B. Search Incident to Arrest

§ 968.11
Chimel v California
89 S. Ct. 2034 (1969)

1) Arresting officer entitled to search person and immediate vicinity for weapons and fruits of crime, pursuant to valid arrest

St v Sanders
2008 WI 85
311 Wis. 2d 257

a. Immediate vicinity is area within which person might gain possession of weapon or destructible evidence

St v Meisenhelder
2022 WI App 37
404 Wis. 2d 75
pet for rev denied

b. Size or nature of area searched is not determinative as long as weapons or evidence of crime could be concealed within

St v Goebel
103 Wis. 2d 203, 217–18
(1981)

c. Search must be substantially contemporaneous with arrest, but may occur after incarceration

St v Wade
215 Wis. 2d 684
(Ct. App. 1997)

d. Same concerns that would justify initial search need to continue to exist to justify delayed search

§ 968.11

2) Justification is to prevent assault on police with weapons, escape, or destruction of evidence

St v Paszek
50 Wis. 2d 619, 624–25
(1971)

3) If arrest invalid, search incident to arrest also invalid

St v Sykes
2005 WI 48
279 Wis. 2d 742

4) Search incident to arrest is lawful if officer has probable cause to arrest before the search and Def is arrested immediately thereafter, although for a different crime

St v Moore
2023 WI 50
408 Wis. 2d 16

Officer who smells odor of marijuana has probable cause to search and need not rule out legal sources of the odor such as CBD

Winston v Lee
105 S. Ct. 1611 (1985)

5) Removing bullet violates suspect's 4th Amendment right to privacy; reasonableness of surgical intrusions beneath the skin to be evaluated on case-by-case basis

St v Payano-Roman
2006 WI 47,
290 Wis. 2d 380

6) Involuntary administration of laxative to recover suspected drugs was reasonable under the circumstances

Washington v Chrisman
102 S. Ct. 812 (1982)

7) When police accompany arrested person to room to retrieve identification, they may seize contraband in plain view

St v Tompkins
144 Wis. 2d 116 (1988)

8) Search incident to arrest does not extend to vehicle parked outside building where Def arrested

Knowles v Iowa
119 S. Ct. 484 (1998)

9) Search may be incident to arrest for noncriminal traffic violation, but full search of car upon issuance of citation is violation of 4th Amendment

St v Marten-Hoye
2008 WI App 19
307 Wis. 2d 671

10) Police may not search person or vehicle incident to the issuance of a civil forfeiture citation

Arizona v Gant
129 S. Ct. 1710 (2009)
St v Dearborn
2010 WI 84
327 Wis. 2d 252
St v Smiter
2011 WI App 15
331 Wis. 2d 431

11) Police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if it is reasonable to believe the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest

St v Coffee
2020 WI 53
391 Wis. 2d 831

After OWI arrest, search of passenger compartment and contents requires reason to believe evidence of the offense may be found, including different intoxicating substances or proof of ingestion or proof of purchase

St v Denk
2008 WI 130
315 Wis. 2d 5

12) Unarrested automobile passengers

a. Person of an unarrested passenger can never be searched solely on grounds that search is incident to the arrest of the driver

b. Under some circumstances, the belongings of an unarrested passenger may be searched incident to driver's arrest

Riley v California
134 S. Ct. 2473 (2014)

13) Warrant required to search information stored on a cell phone seized incident to arrest

C. Consent

US v Matlock
94 S. Ct. 988 (1974)
St v McGovern
77 Wis. 2d 203, 211
(1977)

1) When consent obtained, neither warrant nor probable cause required

US v Mendenhall
100 S. Ct. 1870 (1980)
St v Fillyaw
104 Wis. 2d 700 (1981)
St v Mazur
90 Wis. 2d 293, 302
(1979)

2) Burden on State to show by clear and convincing evidence that consent to warrantless search freely and voluntarily given

St v Goetsch
186 Wis. 2d 1
(Ct. App. 1994)

a. Consent given by Def during improper interrogation may be voluntary and not fruit of poisonous interrogation, if evidence obtained in search was not disclosed during interrogation

Schneckloth v Bustamonte
93 S. Ct. 2041 (1973)
St v Williams
2001 WI App 249
248 Wis. 2d 361,
rev'd, 2002 WI 94
255 Wis. 2d 1
St v Phillips

218 Wis. 2d 180 (1998)
St v Bermudez
221 Wis. 2d 338
(Ct. App. 1998)

b. Voluntariness is factual question based on "totality of all the circumstances"

St v Johnson
2007 WI 32
299 Wis. 2d 675
St v Giebel
2006 WI App 239
297 Wis. 2d 446

c. Consent must be more than mere acquiescence to a claim of lawful authority

US v Mendenhall
100 S. Ct. 1870 (1980)
US v Matlock
94 S. Ct. 988 (1974)

d. Consenting party's knowledge of right to refuse is highly relevant to determination of consent, but not controlling

Georgia v Randolph
126 S. Ct. 1515 (2006)

e. When consent is disputed by occupants who are physically present, there is no consent

St v St Martin
2011 WI 44, ¶ 6
334 Wis. 2d 290

f. Co-tenant's on-site consent trumps refusal to consent by other tenant who is under arrest nearby, but not on the premises

St v Artic
2010 WI 83
327 Wis. 2d 392
St v Phillips
218 Wis. 2d 180 (1998)

3) When consent obtained after 4th Amendment violation, inquiry is whether evidence results from exploitation of police illegality or by means sufficiently attenuated so as to purge the taint

St v Richter
2000 WI 58
235 Wis. 2d 524
St v Bermudez
221 Wis. 2d 338
(Ct. App. 1998)

4) Attenuation factors for Ct to consider:

a. Temporal proximity

b. Intervening circumstances

c. Purpose and flagrancy of intervening conduct

US v Matlock
94 S. Ct. 988 (1974)

St v McGovern
77 Wis. 2d 203 (1977)

5) Third party may consent to search if has common authority over, or sufficient relationship to premises or effects

St v Verhagen
86 Wis. 2d 262
(Ct. App. 1978)

a. Not derived from property law, but from mutual use of property by persons with joint access and control

- Divorced wife had no standing to consent because of separation

St v Abbott
2020 WI App 25
392 Wis. 2d 232

- Estranged spouse may consent if still residing in same house

St v Sobczak
2013 WI 52
347 Wis. 2d 724

- Def's girlfriend who was weekend guest had authority to invite law enforcement to enter Def's residence and view suspicious files on computer

St v Tomlinson
2002 WI 91
254 Wis. 2d 502

- Homeowner's teenage child may consent to entry to home's common areas

McDonald v US
69 S. Ct. 191 (1948)
Stoner v California
84 S. Ct. 889 (1964)
St v Kieffer
217 Wis. 2d 531 (1998)

- Landlords and hotel clerks have limited authority to give consent to search

St v West
185 Wis. 2d 68 (1994)

- Implied consent of probationer or parolee may extend to others in residence

Fernandez v California
134 S. Ct. 1126 (2014)
Georgia v Randolph
126 S. Ct. 1515 (2006)

b. If two persons have equal rights in the premises and both are present at time of search, any evidence obtained will be inadmissible against nonconsenting /party

Illinois v Rodriguez
110 S. Ct. 2793 (1990)
St v Kieffer
217 Wis. 2d 531 (1998)
St v Torres
2018 WI App 23
381 Wis. 2d 268

c. Consent may be valid if police reasonably believed third party had apparent common authority, even though third party did not have actual authority

St v Goebel
103 Wis. 2d 203, 215–16
(1981)

6) If Def consents to show part of property and accidentally displays contraband, police may seize it

St v Wheeler
2013 WI App 53, ¶ 25
347 Wis. 2d 426

7) Police permitted to search where the object sought would be found

St v Jereczek
2021 WI App 30
398 Wis. 2d 226

8) If scope of consent limited, limitation must be followed

St v Douglas
123 Wis. 2d 13, 21 (1985)

9) Implied consent to search home does not justify second search two days later

St v Johnston
184 Wis. 2d 794 (1994)

10) Consent given to undercover officer may be considered as consent to all back-up officers

11) See also Automobiles, **Sec. F.**, *infra*

D. Plain View and Plain Feel (Touch)

Harris v US
88 S. Ct. 992 (1968)
Washington v Chrisman
102 S. Ct. 812 (1982)
St v Altenburg
150 Wis. 2d 663
(Ct. App. 1989)

1) Police must have lawful right to be present pursuant to warrant or other exception in order to seize evidence in plain view

Bies v St
76 Wis. 2d 457, 469–70
(1977)

a. Subject to reasonableness requirement

Bies v St
76 Wis. 2d 457, 473
(1977)
St v Bell
62 Wis. 2d 534, 542
(1974)

b. Not to be used to subvert warrant requirement when police know of location of evidence and plan to seize

Steele v US
45 S. Ct. 414 (1925)

c. No justification for entry when evidence viewed from outside protected structure, i.e., no thresholds crossed

Thompson v Louisiana
105 S. Ct. 409 (1984)

d. Warrant needed when investigators arrived at homicide scene 35 minutes after police left

New York v Class
106 S. Ct. 960 (1986)

e. No reasonable expectation of privacy in vehicle identification number even when officer has to move papers to see it

Arizona v Hicks
107 S. Ct. 1149 (1987)

f. When initial intrusion to residence was to investigate a shooting, moving stereo to see serial numbers was unlawful search

Horton v California
110 S. Ct. 2301 (1990)

2) Discovery of evidence does not need to be inadvertent

St v Sutton
2012 WI App 7
338 Wis. 2d 338

3) Officer must have probable cause to believe evidence seized only connected to commission of crime

Texas v Brown
103 S. Ct. 1535 (1983)
St v Pozo
198 Wis. 2d 705
(Ct. App. 1995)
St v Johnson
187 Wis. 2d 237
(Ct. App. 1994)

a. Items in opaque containers may be seized if officer has probable cause to believe contraband contained inside

St v Washington
134 Wis. 2d 108, 121
(1986)

b. "Plain view" not restricted to items that can be seen, but includes items that can be smelled, touched, heard, or tasted

E. Emergency Aid/Hot Pursuit

Brigham City v Stuart
126 S. Ct. 1943 (2006)
Warden v Hayden
87 S. Ct. 1642 (1967)
St v Ware
2021 WI App 83
400 Wis. 2d 118
St v Larsen
2007 WI App 147
301 Wis. 2d 718

1) If objectively reasonable basis for belief that an occupant of home is seriously injured or imminently threatened with injury, no warrant required

St v Prober
98 Wis. 2d 345, 360–65
(1980)
overruled in part by
St v Weide
155 Wis. 2d 537 (1990)

St v Kraimer
99 Wis. 2d 306 (1980)

2) Police must reasonably believe, both objectively and subjectively, that aid necessary

a. Exception strictly construed to keep as narrow as possible

LaFournier v St
91 Wis. 2d 61, 67 (1979)

b. Limited to extent and duration of emergency

US v Santana
96 S. Ct. 2406 (1976)
West v St
74 Wis. 2d 390 (1976)

3) Suspect may not defeat arrest set in motion in public place by escaping to private place

Warden v Hayden
87 S. Ct. 1642 (1967)

4) When armed felon flees into house immediately before police arrive, police may search as broadly as reasonably necessary to prevent resistance or escape

Lange v California
141 S. Ct. 2011
(2021)

5) If time allows, a warrant is required when suspected misdemeanant flees into house

A law enforcement emergency, such as imminent harm, destruction of evidence, or escape from the home, may justify warrantless entry

US v Fleming
677 F2d 602
(7th Cir 1982)

6) Deterioration of evidence over time may justify warrantless search in hot pursuit

St v Ionescu
2019 WI App 68
389 Wis. 2d 586

7) Warrantless entry of home justifiable under hot pursuit doctrine if pursuit is immediate or continuous

St v Kryzaniak
2001 WI App 44
241 Wis. 2d 358

8) Warrantless entry of home to arrest subject of civil capias not justified

Welsh v Wisconsin
104 S. Ct. 2091 (1984)
St v Weber
2016 WI 96
372 Wis. 2d 202
(plurality)

9) Warrantless entry of suspect's home for nonjailable offense prohibited by 4th Amendment

St v Peardot
119 Wis. 2d 400, 404
(Ct. App. 1984)

10) After "controlled buy" of narcotics, warrantless entry into suspect's home justified by exigent circumstances

St v Wilson
2022 WI 77, ¶ 38
404 Wis. 2d 623

11) "Hot pursuit" permits entry into protected area only if pursuit is immediate and continuous

St v Londo
2002 WI App 90
252 Wis. 2d 731

12) Police may enter dwelling to investigate ongoing burglary

St v Pires
55 Wis. 2d 597 (1972)
St v Rome
2000 WI App 243
239 Wis. 2d 491

13) No warrant required when searching officer motivated by perceived need to render aid, and reasonable person would believe emergency exists

St v Kirby
2014 WI App 74
355 Wis. 2d 423

14) Officer safety justified step across the threshold to check backpack for sawed-off shotgun

F. Automobiles (Traffic Stops)

St v Wright
2019 WI 45, ¶ 8
381 Wis. 2d 495

1) A traffic stop is a seizure

Arizona v Johnson
129 S. Ct. 781, 788 (2009)
St v Salonen
2011 WI App 157, ¶ 10
338 Wis. 2d 104

2) A roadside stop ordinarily begins when a vehicle is pulled over for a traffic violation and ends when the police no longer have further need to control the scene, after which the driver and passengers are free to leave

§ 175.40(2)

3) Police officer may, when in fresh pursuit, follow anywhere in State and stop/arrest any person for violation of any law officer authorized to enforce

City of Brookfield
v Collar
148 Wis. 2d 839
(Ct. App. 1989)

a. Officer must act without unnecessary delay

b. Pursuit must be continuous and uninterrupted, although continuous surveillance not required

c. Commission of offense, commencement of pursuit, and apprehension of suspect should be close in time

St v Wright
2019 WI 45, ¶ 9
381 Wis. 2d 495

4) The mission of a traffic stop includes:

a. Addressing the traffic violation

b. Conducting ordinary inquiries incident to the stop, such as

St v Smith
2018 WI 2
379 Wis. 2d 86

- Driver's identification, registration, and insurance

St v Davis
2021 WI App 65, ¶ 27
399 Wis. 2d 354

- Warrant status
- Bond conditions

— Stop may not be prolonged absent independent reasonable suspicion of violations

c. Taking negligibly burdensome precautions for officer safety while completing the mission of the traffic stop

St v Floyd
2017 WI 78, ¶ 28
377 Wis. 2d 394

- Including questions about the presence of any weapons and asking to search the driver

St v Brown
2020 WI 63
392 Wis. 2d 454

- Even if asked after writing the ticket and just before releasing the driver

5) Reasonable suspicion for traffic stop judged on totality of circumstances

St v Popke
2009 WI 37
317 Wis. 2d 118
St v Post
2007 WI 60
301 Wis. 2d 1

a. Weaving within single lane of traffic does not alone give grounds for stop, but operating left of center may

St v Iverson
2015 WI 101
365 Wis. 2d 302

b. Traffic stop may be based solely on observation of nontraffic forfeiture offense such as littering by a passenger

St v Richey
2022 WI 106

405 Wis. 2d 132

c. Traffic stop based on observations of another officer requires sufficient evidence to infer driver being stopped was driver observed

US v Johnson
874 F3d 571
(7th Cir 2017)
St v Genous
2021 WI 50
397 Wis. 2d 293

d. If police suspect unlawful conduct, not required to wait and rule out possible lawful exceptions

Kansas v Glover
140 S. Ct. 1183 (2020)
St v Newer
2007 WI App 236
306 Wis. 2d 193

e. Knowledge that owner's license is revoked provides grounds for a stop unless officer has reason to believe owner is not the driver

St v Smith
2018 WI 2
379 Wis. 2d 86

- Even if reason for stop dissipates, police may continue stop to make "ordinary inquiries," including check of driver's identification

St v Sherry
2004 WI App 207
277 Wis. 2d 194
St v Marquardt
2001 WI App 219
247 Wis. 2d 765

6) Auto may be searched without warrant if there is probable cause to search vehicle, and vehicle is readily mobile

a. For a search of auto incident to arrest, see **Sec. B.**8)–12) above

St v Buchanan
2011 WI 49
334 Wis. 2d 379

7) Warrantless nonconsensual search of passenger compartment for officer safety is permitted only if officer has objective reason to believe that suspect is dangerous and may gain immediate control of weapons

St v VanBeek
2021 WI 51
297 Wis. 2d 311

8) Taking driver's license to squad car to run the record could transform a consensual encounter into a seizure based on totality of the circumstances

a. No bright-line rule

b. Retaining driver's license, without reasonable suspicion, a key factor in whether an unlawful seizure has occurred

St v Davis
2021 WI App 65
399 Wis. 2d 354

9) Absent reasonable suspicion, extension of stop solely to check conditions of driver's release on bail or bond violates 4th Amendment

Illinois v Caballes
125 S. Ct. 834 (2005)
St v Arias
2008 WI 84
311 Wis. 2d 358

10) Use of drug dog to sniff exterior of car during lawful traffic stop does not infringe 4th Amendment

a. Unless dog sniff extends stop beyond original purpose without reasonable suspicion (*See infra* **Sec. F.**11))

St v Campbell
No. 2020AP1813-CR
2024 WL 934246
(Wis. Ct. App. 3/5/2024)
(publication
recommended)
pet for rev filed

b. Entry into vehicle by dog constitutes search requiring consent or other exception

St v Adell
2021 WI App 72, ¶ 16
399 Wis. 2d 399
St v Betow
226 Wis. 2d 90, 94–95
(Ct. App. 1999)

11) Stop may be extended and new investigation begun if

a. Officer becomes aware of additional suspicious factors rising to an articulable suspicion that person committed or is committing an offense distinct from acts that prompted initial stop

b. Validity of extension is tested with same criteria as initial stop

Rodriguez v US
135 S. Ct. 1609 (2015)
St v House
2013 WI App 111
350 Wis. 2d 473

12) Extension of stop beyond original purpose to conduct dog sniff violates 4th Amendment

13) Consent to search incident to or after traffic stop

St v Floyd
2017 WI 78, ¶¶ 29–34
377 Wis. 2d 394
St v Williams
2002 WI 94
255 Wis. 2d 1
St v Luebeck
2006 WI App 87
292 Wis. 2d 748

a. Voluntariness determined based on totality of the circumstances

Ohio v Robinette
117 S. Ct. 417 (1996)

b. 4th Amendment does not require that seized persons be advised they are free to go before consent can be found to be voluntary

St v Wantland
2014 WI 58
355 Wis. 2d 135

c. Limitations of consent must be clear and unequivocal

Arkansas v Sullivan
121 S. Ct. 1876 (2001)
US v Johnson
874 F3d 571
(7th Cir 2017)

14) Ulterior motives of police irrelevant so long as there is probable cause for traffic stop

St v Secrist
224 Wis. 2d 201 (1999)

15) Warrantless search of automobile found in public place is justified when police have probable cause to believe it contains evidence of crime

Chambers v Maroney
90 S. Ct. 1975 (1970)

a. May seize and search later at police station, if probable cause existed when seized

US v Mazzone
782 F2d 757, 759
(7th Cir 1986)

b. If officer has probable cause to believe closed container in car contains contraband, warrantless search permitted

Wyoming v Houghton
119 S. Ct. 1297 (1999)
St v Matejka
2001 WI 5
241 Wis. 2d 52
St v Jackson
2013 WI App 66, ¶ 8
348 Wis. 2d 103
St v Lefler
2013 WI App 22, ¶ 11
346 Wis. 2d 220

c. If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search

Cardwell v Lewis
94 S. Ct. 2464 (1974)
Rakas v Illinois
99 S. Ct. 1035 (1978)

16) Diminished expectation of privacy because cars are seldom residences or repositories of personal effects, and most contents in plain view

St v Johnson
187 Wis. 2d 237
(Ct. App. 1994)
St v Jones

142 Wis. 2d 570
(Ct. App. 1987)

a. Items found inside containers located in automobiles no longer require separate warrant. Scope of search defined by its object

Arizona v Gant
129 S. Ct. 1710 (2009)

b. Police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if it is reasonable to believe the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest

California v Carney
105 S. Ct. 2066 (1985)
St v Durbin
170 Wis. 2d 475
(Ct. App. 1992)

c. Motor homes and camper-trailers are "automobiles" for purposes of "automobile exception," if they are operated on a highway or situated so as to indicate that they are not being used as residences

St v Field
123 Wis. 2d 466, 471
(Ct. App. 1985)

17) Knock and announce not needed for warrantless auto search

Heien v North Carolina
135 S. Ct. 530 (2014)
St v Houghton
2015 WI 79
364 Wis. 2d 234

18) If officer's suspicion is based on mistake of law, justification for a traffic stop exists, so long as mistake is reasonable

Arkansas v Sullivan
121 S. Ct. 1876 (2001)

G. Inventory Searches: Automobiles and Arrestees

South Dakota v Opperman
96 S. Ct. 3092 (1976)
St v Brooks
2020 WI 60
392 Wis. 2d 402

1) If police have lawful custody, warrantless custodial or inventory search reasonable

a. Based on administrative necessity rather than probable cause

b. Allowed in order to

- Protect owner's property
- Protect police against claims or disputes over lost or stolen property

- Protect police from potential danger

Illinois v LaFayette
103 S. Ct. 2605 (1983)

c. Jailhouse inventories of arrestee's possessions may include removal and listing of items found within closed containers, such as shoulder bags

Colorado v Bertine
107 S. Ct. 738 (1987)

d. Policies behind warrant requirement and probable cause for closed trunks and suitcases not implicated in inventory searches

Thompson v St
83 Wis. 2d 134 (1978)
St v Prober
98 Wis. 2d 345 (1980)
overruled in part by
St v Weide
155 Wis. 2d 537 (1990)

2) Search must be disinterested cataloging of contents; not designed for collection of evidence

St v Callaway
106 Wis. 2d 503 (1982)

3) Police may impound vehicle if either informed consent or reasonable police need (e.g., unattended car illegally parked, blocking traffic, abandoned car or use of car in crime and needed for retention as evidence)

St v Callaway
103 Wis. 2d 389, 401
(Ct. App. 1981)

a. State has burden to show lawful impoundment before inventory search

St v Callaway
106 Wis. 2d 503, 515–16
(1982)

b. Lawful scope of inventory search includes trunk and locked glove box of automobile

St v Prober
98 Wis. 2d 345, 355–56
(1980)

c. Sealed items found on inventory of vehicle not to be searched

Florida v Meyers
104 S. Ct. 1852 (1984)
US v Johns
105 S. Ct. 881 (1985)

d. Impounded car can be searched second time without warrant; even contents may be stored and later opened without warrant

St v Axelson
149 Wis. 2d 339
(Ct. App. 1989)

4) Delay of several days in conducting inventory search does not render it invalid

St v Matalonis
2016 WI 7
366 Wis. 2d 443
St v Blatterman

2015 WI 46
362 Wis. 2d 138

H. Community Caretaker Function

1) To decide whether seizure based on community caretaker function is reasonable, Ct must determine

a. That seizure within meaning of 4th Amendment has occurred,

b. Whether police conduct was bona fide community caretaker activity, AND

St v Maddix
2013 WI App 64
348 Wis. 2d 179
St v Ultsch
2011 WI App 17
331 Wis. 2d 242

c. Whether public need and interest outweigh intrusion upon individual privacy

Caniglia v Strom
141 S. Ct. 1596
(2021)

2) Community caretaker function never justifies a warrantless entry into a home

But see emergency aid exception, **Sec. E.**, *supra*

St v Ellenbecker
159 Wis. 2d 91
(Ct. App. 1990)

3) In a motorist assist, requesting driver's license and running status check is reasonable under 4th Amendment

St v Asboth
2017 WI 76, ¶ 27
376 Wis. 2d 644

4) In vehicle impoundment, presence or absence of or adherence to criteria governing police discretion is not dispositive

St v Brooks
2020 WI 60
392 Wis. 2d 402

5) Seizure must be lawful, even under community caretaker function, before inventory search is lawful

I. Temporary Detention/Stop and Frisk

968.24
Terry v Ohio
88 S. Ct. 1868 (1968)
St v Flynn
92 Wis. 2d 427, 434
(1979)
Jones v St
70 Wis. 2d 62, 67 (1975)
St v Stout

2002 WI App 41
250 Wis. 2d 768

1) Without probable cause, police may temporarily detain and question suspect in a public place if reasonable suspicion to believe suspect involved in criminal activity

Dunaway v NY
99 S. Ct. 2248 (1979)
US v Brignoni-Ponce
95 S. Ct. 2574 (1975)

a. Detention must be brief and narrowly circumscribed

Florida v Royer
103 S. Ct. 1319 (1983)
St v Vorburger
2001 WI App 43
241 Wis. 2d 481, *rev'd*,
2002 WI 150
255 Wis. 2d 537

b. Police may not seek to verify suspicions by means that approach conditions of arrest

US v Smith
3 F3d 1088
(7th Cir 1993)

c. Handcuffing Def does not necessarily turn legal *Terry* stop into arrest

Terry v Ohio
88 S. Ct. 1868 (1968)
St v Williams
2001 WI 21
241 Wis. 2d 631
St v Waldner
206 Wis. 2d 51 (1996)

2) Adequacy of information to justify detention judged by objective standard based on specific articulable facts together with rational inferences

a. Lawful activities may provide basis for reasonable suspicion depending on cumulative effect and inferences

St v Rissley
2012 WI App 112
344 Wis. 2d 422
St v Olson
2001 WI App 284,
249 Wis. 2d 391

b. Reasonable suspicion of past crime may justify traffic stop

Hayes v Florida
105 S. Ct. 1643 (1985)

c. Reasonable suspicion does not permit detention of suspect at police station to obtain fingerprints

US v Sharpe
105 S. Ct. 1568 (1985)

d. Investigative detention reasonable if investigation conducted in diligent and reasonable manner to confirm or dispel suspicions quickly

St v Gordon
2014 WI App 44
353 Wis. 2d 468

e. *Terry* stop not permitted merely because suspect, who was in a "high-crime area," momentarily patted the outside of his clothing on seeing police

St v Meddaugh
2022 WI App 12
401 Wis. 2d 134

f. Failure to stop when asked cannot be used to support reasonable suspicion if officer lacked reasonable suspicion to begin with

3) Seizure of person/flight

US v Mendenhall
100 S. Ct. 1870 (1980)
St v Washington
2005 WI App 123
284 Wis. 2d 456

a. Suspect is "seized" only when by means of force or show of authority his/her freedom of movement is restrained

St v Cundy
2023 WI App 41
409 Wis. 2d 34

b. Seizure occurs when officer standing outside doorway to home denies request of suspect within home to terminate the encounter

California v Hodari D
111 S. Ct. 1547 (1991)
St v Young
2006 WI 98
294 Wis. 2d 1

c. Suspect who does not yield to a display of authority and flees is not "seized" for 4th Amendment purposes, and evidence discarded during flight need not be suppressed

4) Informants and anonymous tips

Alabama v White
110 S. Ct. 2412 (1990)
St v Miller
2012 WI 61
341 Wis. 2d 307

a. When anonymous tipster supplies predictive information and police then verify significant aspects of that information, stop is justified

Florida v JL
120 S. Ct. 1375 (2000)

b. Anonymous tips that person is armed, without more, not sufficient to justify a stop and frisk

St v Williams
2001 WI 21
241 Wis. 2d 631

c. Anonymous tip to 9-1-1 verified only by readily observable facts is sufficient to establish reasonable suspicion for a temporary stop and frisk

St v Rutzinski
2001 WI 22
241 Wis. 2d 729

St v Patton
2006 WI App 235
297 Wis. 2d 415

d. Anonymous tip is sufficient justification for stop if tip contains sufficient indicia of informant's reliability and allegations of tip suggest that suspect poses immediate threat to public safety

St v Sisk
2001 WI App 182
247 Wis. 2d 443

e. 9-1-1 call from pay phone when caller identifies self by name is not anonymous tip

5) Technology

St v Nimmer
2022 WI 47
402 Wis. 2d 416

ShotSpotter report sufficient justification for stop if timing of response and observations at scene support reasonable suspicion suspect involved in shooting

§ 968.25
Terry v Ohio
88 S. Ct. 1861 (1968)
St v Kelsey CR
(In Int of Kelsey CR)
2001 WI 54
243 Wis. 2d 422
St v Morgan
197 Wis. 2d 200 (1995)
St v Guy
172 Wis. 2d 86 (1992)

6) In order to frisk suspect, police must have reasonable suspicion that suspect armed or dangerous, based on totality of circumstances

Illinois v Wardlow
120 S. Ct. 673 (2000)
St v Kelsey CR
(In Int of Kelsey CR)
2001 WI 54
243 Wis. 2d 422
St v Anderson
155 Wis. 2d 77 (1990)
St v Jackson
147 Wis. 2d 824 (1989)

a. Flight alone, depending on totality of circumstances, may justify investigatory stop

Adams v Williams
92 S. Ct. 1921 (1972)

b. Frisk is not evidentiary search, but done to allow officer to pursue investigation without fear of violence

St v Flynn
92 Wis. 2d 427, 435
(1979)

c. Only slight justification needed to justify pat-down for serious felony

Terry v Ohio
88 S. Ct. 1861 (1968)

d. Though scope of pat-down limited, feeling hard object justifies further inquiry

Minnesota v Dickerson
113 S. Ct. 2130 (1993)
St v Buchanan
178 Wis. 2d 441
(Ct. App. 1993)

e. If officer can develop probable cause by lawfully feeling item through clothing, it may be seized immediately

St v Triplett
2005 WI App 255
288 Wis. 2d 515

f. Pat-down may include minimally invasive manipulation of clothing

St v Johnson
2007 WI 32
299 Wis. 2d 765

g. Search may include passenger compartment of vehicle but only if reasonable suspicion exists

St v Nesbit
2017 WI App 58, ¶ 6
378 Wis. 2d 65

h. Officer may not frisk for weapons before giving person a ride without reasonable suspicion that person is armed

§ 968.24
St v Blatterman
2015 WI 46
362 Wis. 2d 138
St v Quartana
213 Wis. 2d 440
(Ct. App. 1997)

7) Temporary detention and questioning must be conducted where person stopped

Person may be moved from one location to another if within the vicinity and for a reasonable purpose

Dunaway v New York
99 S. Ct. 2248 (1979)

8) Custodial interrogation not justified on *Terry* standards

a. Probable cause required, whether or not formal arrest results

US v Rico
594 F2d 320, 326
(2d Cir 1979)

b. Investigatory stop may justify subsequent arrest, if sufficient evidence for Def's arrest rapidly develops

US v Beck
598 F2d 497, 501 n3
(9th Cir 1979)

c. But if arrest based on less than probable cause, redesignating it as investigatory stop will not save it

US v Place
103 S. Ct. 2637 (1983)

9) Temporary detention of luggage

a. Upon reasonable suspicion, police may temporarily detain luggage for limited investigation

b. 90-minute detention exceeds permissible scope

US v Borys
766 F2d 304
(7th Cir 1985)

c. 75-minute detention at airport to await narcotics dog not unreasonable

10) Temporary traffic stops

Delaware v Prouse
99 S. Ct. 1391 (1979)

a. Even brief stop of car is seizure and must be judged by objective standard of reasonableness

Whren v US
116 S. Ct. 1769 (1996)
St v Griffith
2000 WI 72
236 Wis. 2d 48
St v Harris
206 Wis. 2d 243 (1996)

b. Stop of vehicle is also seizure of all occupants

St v Griffin
183 Wis. 2d 327
(Ct. App. 1994)

c. Random stops not permitted; officer must demonstrate articulable suspicion that driver unlicensed or violating traffic law

St v Lord
2006 WI 122
297 Wis. 2d 592

d. Officer cannot infer wrongful conduct based solely on display of a temporary license plate

11) Checkpoints

§ 349.02(2)
City of Indianapolis
v Edmond
121 S. Ct. 447 (2000)

a. Highway checkpoint program under which police, without individualized suspicion, stop vehicles for primary purpose of discovering drugs violates 4th Amendment

St v Scott
2017 WI App 74
378 Wis. 2d 578

b. Roadblock that went beyond ordinary crime control and was appropriately tailored to apprehend suspect who was likely to flee by way of particular route did not violate 4th Amendment

- Factors to determine reasonableness of checkpoint-type stop are gravity of the public concerns served by the seizure, degree to which the seizure advances the public interest, and severity of the interference with individual liberty

Alabama v White
110 S. Ct. 2412 (1990)
St v Williams
2001 WI 21
241 Wis. 2d 631

12) Stop is permitted based on anonymous tip if facts show sufficient indicia of reliability, corroborated by independent police work to support a reasonable suspicion

California v Hodari D
111 S. Ct. 1547 (1991)
Cty of Grant v Vogt
2014 WI 76, ¶ 25
356 Wis. 2d 343

13) Seizure does not occur so long as reasonable person would feel free to disregard police and go about his/her business

J. School Searches

New Jersey v TLO
105 S. Ct. 733 (1985)

1) School search is legal when

a. It is justified at its inception, and

b. It is reasonably related in scope to the circumstances that justified the intrusion in the first place

LL v Circuit Ct
(In Int of LL)
90 Wis. 2d 585
(Ct. App. 1979)

2) 4th Amendment applies but

a. Doctrine of *in loco parentis* lowers standard applied in determining reasonableness

b. Articulable basis for search required

St v Angelia DB
(In Int of Angelia DB)
211 Wis. 2d 140 (1997)

3) Lesser standard of "reasonable grounds" applies to search conducted on school grounds by police officer done at request of school authorities

St v Schloegel
2009 WI App 85
319 Wis. 2d 741

4) School "grounds" includes school parking lot

St v Vang
2021 WI App 28
398 Wis. 2d 311

5) Non-students on school grounds also subject to search

K. Probation/Parole/Extended Supervision (persons on supervision)

US v Knights
122 S. Ct. 587 (2001)
St v Hajicek
2001 WI 3
240 Wis. 2d 349
St v Griffin
131 Wis. 2d 41, 46 (1986)

1) Agent may search home of person on supervision with reasonable grounds to suspect contraband (probable cause not needed)

St v West
185 Wis. 2d 68 (1994)

2) Search may be conducted over explicit objections of those living with person on supervision as permission to conduct searches is treated as if person had given actual and present consent

St v Wheat
2002 WI App 153
256 Wis. 2d 270

3) Reasonable search is lawful even if agent relies, in part, on information from police in violation of the 4th Amendment

St v Purtell
2014 WI 101
358 Wis. 2d 212
St v Keller
2017 WI App 19
374 Wis. 2d 325

4) Warrantless search of computer of a person on supervision permissible by agent or police expert if agent has reasonable grounds to believe computer contains contraband

§ 302.113(7r)
St v Anderson
2019 WI 97
389 Wis. 2d 106

L. Law Enforcement Search of Person on Supervision

Law enforcement officer may search person, residence, and any property at any time during period of supervision

1) If officer knows person is under supervision status, and

2) Under totality of the circumstances, officer reasonably suspects that person is committing, is about to commit, or has committed a crime, or a violation of a condition of extended supervision

3) Search must be conducted in a reasonable manner

4) Search may not be arbitrary, capricious, or harassing

5) Officer shall, as soon as practicable after search, notify DOC

M. Administrative Inspection

Donovan v Dewey
101 S. Ct. 2534 (1981)
St v Mendoza
220 Wis. 2d 803
(Ct. App. 1998)
rev'd on other grounds
227 Wis. 2d 838 (1999)
Lundeen v Dept of Agric
189 Wis. 2d 255
(Ct. App. 1994)

1) Reasonable without warrant as long as

a. Inspection relates to governmental scheme that furthers a substantial governmental interest

b. Inspection necessary to further the governmental scheme

c. Inspection scheme must be certain and regular in its application

Whren v US
116 S. Ct. 1769 (1996)
St v Mendoza
220 Wis. 2d 803
(Ct. App. 1998)
rev'd on other grounds
227 Wis. 2d 838 (1999)

2) Administrative inspections, unlike traffic stops, are not reasonable if conducted as a pretext to obtain evidence of other criminal violations

St v Jackowski
2001 WI App 187
247 Wis. 2d 430

3) Suppression not available as remedy for mere statutory violation in issuance of inspection warrant when police acted in good faith in executing warrant

N. Other Exceptions

1) Bank records

a. Open question as to whether warrant required

St v Hoffman
106 Wis. 2d 185, 215
(Ct. App. 1982)

b. Bank records obtained by subpoena of third party not suppressible

St v Swift
173 Wis. 2d 870
(Ct. App. 1993)

St v Monosso
103 Wis. 2d 368
(Ct. App. 1981)

2) Fire officials entitled to inspect fire scene to determine cause of fire, including those areas not directly affected by fire

Maryland v Macon
105 S. Ct. 2778 (1985)

3) Pornography: purchase of obscene magazines from adult bookstore not a seizure

4) Buses (Drug interdiction)

Florida v Bostick
111 S. Ct. 2382 (1991)

a. Officers may approach passengers at random to ask questions and request consent so long as reasonable person would feel free to decline

US v Drayton
122 S. Ct. 2105 (2002)

b. Boarding of bus at rest stop did not constitute seizure or otherwise invalidate subsequent, consensual searches

5) OWI Blood Draw—See **TR 1, Sec. 12**

St v Parisi
2016 WI 10
367 Wis. 2d 1

6) Warrantless blood draw to collect evidence of heroin
ingestion may be justified by exigent circumstances

CR 20: SUPPRESSION—IDENTIFICATION

1. General

Simmons v US
88 S. Ct. 967 (1968)
Stovall v Denno
87 S. Ct. 1967 (1967)

A. Def has due-process right not to be subject to unnecessarily suggestive identification procedure

US v Wade
87 S. Ct. 1926 (1967)

B. Concern is that influence of improper suggestions upon identifying witnesses causes serious miscarriage of justice

Manson v Braithwaite
97 S. Ct. 2243 (1977)

C. Societal interests in fair identification procedures include

1) Deterring improper police practices

2) Furthering administration of justice

3) Keeping unreliable evidence from jury

2. Right to Counsel

Simos v St
83 Wis. 2d 251, 254
(1978)

A. 6th Amendment right to counsel issues must be treated separately from due-process considerations of suggestiveness

US v Wade
87 S. Ct. 1926 (1967)

B. Post-indictment lineup is critical stage of proceedings requiring assistance of Atty to avert unfairness at trial and to allow proper confrontation

1) Sanction for failure to provide Atty is suppression of in-Ct identification, unless State can establish independent source by clear and convincing evidence

Wright v St
46 Wis. 2d 75, 85 (1970)

2) Substitute Atty may be given to Def to expedite identification procedure since no requirement that same Atty represent Def at trial

Kirby v Illinois
92 S. Ct. 1877 (1972)

C. Right to counsel does not apply if

St v Taylor
60 Wis. 2d 506, 521–22
(1973)
US ex rel Hall v Lane
804 F2d 79
(7th Cir 1986)

1) Lineup occurs before subject charged

2) Suspect makes voluntary, intelligent waiver of right to Atty

3) One-on-one show-up

4) Photographic identification

3. Procedure on Suppression Motion

§ 971.31(2), (5)

A. Issue of admissibility must be raised by pretrial motion and heard outside presence of jury in pretrial hearing

St v Cole
50 Wis. 2d 449, 460
(1971)

1) If issue arises for first time on cross-examination, Def may request hearing outside presence of jury

§ 908.01(4)(a)3.
§ 911.01(4)(a)

2) Hearsay admissible at hearing challenging identification

§ 901.04(4)
Harris v New York
91 S. Ct. 643 (1971)
Simmons v US
88 S. Ct. 967 (1968)

3) Def may testify without being cross-examined on other subjects or allowing State to use testimony in case-in-chief except for impeachment purposes

St v Marshall
92 Wis. 2d 101, 117–18
(1979)
US v Thevis
665 F2d 616
(5th Cir 1982)

B. Suppression applies only to intentional police procedures, not to inadvertent procedures

Watkins v Sowders
101 S. Ct. 654 (1981)

C. Def not automatically entitled to an evidentiary hearing whenever ID admissibility is challenged

St v Garner
207 Wis. 2d 520
(Ct. App. 1996)

1) Def must show a reasonable possibility that hearing will establish a factual basis for Def to prevail

2) But Def is not entitled to hearing simply to search or as a discovery tool

D. Lineups and photographic identification

St v Roberson
2006 WI 80, ¶ 34,
292 Wis. 2d 280
St v Nawrocki
2008 WI App 23
308 Wis. 2d 227

1) In-Ct identification admissible regardless of suppressed out-of-Ct identification, if the identification is based on an independent recollection sufficiently distinguishable to purge the primary taint

St v Armstrong
110 Wis. 2d 555, 577
(1983)
Powell v St
86 Wis. 2d 51, 65 (1978)

2) Def has initial burden to show identification unnecessarily suggestive

a. Factors bearing on suggestiveness

- Statements made to victim or photographs shown

- Relative dissimilarity in appearance

— Height, weight, hair, race, glasses, clothing, scars

- Dissimilarity in presentation of suspects
- Ease with which suggestiveness could have been avoided
- Interaction between multiple victims, although serial presentation not per se suggestive
- Aspects of procedure/photos that unduly emphasize Def

St v Mosley
102 Wis. 2d 636, 652
(1981)
Fells v St
65 Wis. 2d 525 (1974)

b. If Def fails to show suggestiveness, State need not show reliability

St v Mosley
102 Wis. 2d 636, 652
(1981)

3) If identification was unnecessarily suggestive, burden shifts to State to show by clear and convincing evidence that out-of-Ct identification was reliable

Neil v Biggers
93 S. Ct. 375 (1972)
Powell v St
86 Wis. 2d 51, 64–65
(1978)

a. Reliability determined by totality of circumstances test

Neil v Biggers
93 S. Ct. 375 (1972)
Powell v St
86 Wis. 2d 51, 65 (1978)

b. Factors bearing on reliability

- Opportunity of victim to view suspect at time of crime
- Witness's degree of attention
- Accuracy of prior description
- Failure to identify Def on prior occasion
- Level of certainty at identification

- Lapse of time between identification and crime
- Any prior identification of person other than Def

St v McMorris
213 Wis. 2d 156 (1997)

4) If identification inadmissible, burden shifts to State to show by clear and convincing evidence that in-Ct identification was from independent source

US v Wade
87 S. Ct. 1926 (1967)
Holmes v St
59 Wis. 2d 488, 498–99
(1973)

a. Factors bearing on independent source of identification

- Witness's opportunity to observe criminal act and degree of attention
- Discrepancy between pre-lineup description and Def's actual appearance
- Any identification of Def by photo before lineup
- Failure to identify Def on prior occasion
- Level of certainty as to identification
- Lapse of time between identification and crime
- Any prior identification of person other than Def

St v Ledger
175 Wis. 2d 116
(Ct. App. 1993)

5) Voice lineup governed by same standard

4. One-on-One Show-Ups

St v Roberson
2019 WI 102
389 Wis. 2d 190

A. Def has burden that procedure employed was impermissibly suggestive

B. If Def meets burden, State must show identification was reliable under totality of circumstances

C. Show-up not necessary unless police:

1) Lacked probable cause to arrest, or

2) Due to other exigent circumstances, could not conduct lineup or photo array

Stovall v Denno
87 S. Ct. 1967 (1967)

D. May be necessitated by time constraints or emergency

1) Should only be used within 24 hours after crime when lineup not otherwise available

Johnson v St
47 Wis. 2d 13, 18–19
(1970)

2) Policy factors supporting one-on-one show-up

a. Added reliability because of nearness in time

b. Allows expeditious release of innocent suspect

St v Hibl
2006 WI 52
290 Wis. 2d 595

E. Not inherently suggestive and inadmissible when identification is spontaneous or accidental. Ct must serve as gatekeeper and employ § 904.03 analysis

5. Other Identification

St v Stinson
134 Wis. 2d 224
(Ct. App. 1986)

A. Bite mark evidence can be admissible on issue of identity

St v Ledger
175 Wis. 2d 116
(Ct. App. 1993)

B. Voice exemplars not impermissibly suggestive

6. Jury Instruction

US v Telfaire,
469 F2d 552, 558
(DC Cir 1972)

A. When identification is major issue, should give special instruction to jury

1) Model instruction set forth in *Telfaire*

2) Wis JI-Cr 141 is modified Wis instruction incorporating some elements of *Telfaire*

CR 21: SUPPRESSION—CONFESSIONS/WITNESS STATEMENTS

1. Suppression Motion Procedure

§ 971.31(3), (4)
Miranda v Arizona
86 S. Ct. 1602 (1966)
St v Jerrell CJ
(In Int of Jerrell CJ)
2005 WI 105
283 Wis. 2d 145

A. Def may challenge both voluntariness and compliance with 6th Amendment and with *Miranda* and *Jerrell* by pretrial motion or objection at trial

1) Recommendation

Roney v St
44 Wis. 2d 522, 535
(1969)
Bradley v St
36 Wis. 2d 345 (1967)

a. Resolve issues at pretrial hearing to avoid jury delay, provide opportunity for research, and aid in settlement of case

St v Monje
109 Wis. 2d 138, 149–50
(1982)

b. If Def chooses not to object to admission of statement, take affirmative waiver from Def and counsel

§ 971.23(1)
St ex rel Goodchild v Burkefe
27 Wis. 2d 244, 264
(1965)

2) Prosecutor has obligation, when practical, to notify Def within reasonable time before trial of any confessions or admissions to be offered at trial

Roney v St
44 Wis. 2d 522, 535
(1969)

3) If Def establishes surprise at existence of statements at trial, delay may be required to prepare for hearing

St v Monje
109 Wis. 2d 138, 149–50
(1982)

4) Def's right to challenge confessions or admissions may be waived, unless

a. Def requests *Miranda/Goodchild/Jerrell* hearing (even at trial), and

b. Def gives specific objections to certain statements

c. However, reversible error if Judge fails to conduct *Goodchild* hearing before Def's statement introduced

§ 938.31(3)
St v Jerrell CJ
(In Int of Jerrell CJ)
2005 WI 105
283 Wis. 2d 145

5) Juv Def may seek to suppress statements made without at least audiotape recording

B. Hearing

1) Procedure

St v Echols
175 Wis. 2d 653 (1993)
Wold v St
57 Wis. 2d 344 (1973)

a. Both voluntariness and *Miranda* issues may be heard at same hearing, but separate findings of fact and conclusions of law should be made on record for each issue

§ 971.31(3)
Pinczkowski v St
51 Wis. 2d 249, 255
(1971)
McKinley v St
37 Wis. 2d 26 (1967)

b. Hearing must be held outside presence of jury

St v Miller
35 Wis. 2d 454 (1967)

c. Scope within discretion of Ct

- Not to be converted into pretrial discovery proceeding

Roney v St
44 Wis. 2d 522, 533
(1969)

- Weight and credibility of statement not in issue at hearing

Lee v Illinois
106 S. Ct. 2056 (1986)

- Truth or falsity of statement not relevant

St v Zamzow
2017 WI 29, ¶ 24
374 Wis. 2d 220

d. Right of confrontation does not apply during pretrial proceedings

Colorado v Connelly
107 S. Ct. 515 (1986)

2) State must, by preponderance of the evidence (greater weight of the credible evidence):

St v Santiago
206 Wis. 2d 3 (1996)
St v Jones
192 Wis. 2d 78 (1995)

a. Show compliance with *Miranda*, including issues of custody, interrogation, and Def's understanding and waiver of rights

St v Agnello
226 Wis. 2d 164 (1999)

b. Demonstrate voluntariness—lack of police coercion

St v Samuel
2002 WI 34
252 Wis. 2d 26

- Standard of preponderance of evidence also applies to state's burden of proving a witness's statement was voluntary

St v Jiles
2003 WI 66
262 Wis. 2d 457

NOTE: Unsworn police reports alone are generally not sufficient to meet burden.

C. Use of statements at trial

Harris v New York
91 S. Ct. 643 (1971)
St v Franklin
228 Wis. 2d 408
(Ct. App. 1999)

1) Statements taken in violation of *Miranda* and *Edwards* are suppressed from State's case-in-chief

St v Garcia
2020 WI App 71
394 Wis. 2d 743
aff'd by equally divided ct
2021 WI 76
399 Wis. 2d 324

Voluntary suppressed statements may be used only for impeachment of Def and only if Def testifies

Upchurch v St
64 Wis. 2d 553 (1974)

2) Involuntary statements may not be used for any purpose

Kutchera v St
69 Wis. 2d 534, 546
(1975)

3) Written confession need not be signed by Def to be admissible

St v Jensen
147 Wis. 2d 240 (1988)

4) Written or recorded confession admitted into evidence treated like any other exhibit in determining whether it should be sent to jury room

St v Schultz
152 Wis. 2d 408 (1989)

5) Def's testimony at *Goodchild* hearing may be used to impeach trial testimony

St v Lindh
161 Wis. 2d 324 (1991)

6) Compliance with *Miranda* need not be shown to use Def's statements to psychiatrist in insanity phase of trial

St v Johnson
193 Wis. 2d 382
(Ct. App. 1995)

7) Postpolygraph interview, distinct from polygraph, may be admitted in case-in-chief. For further discussion, see **CR 28, Polygraph, Sec. 3.A.**

St v Dobbs
2020 WI 64, ¶¶ 52, 68
392 Wis. 2d 505

8) Admission at trial of statements made in violation of *Miranda* is subject to harmless-error analysis

2. Voluntariness Standards Generally

A. Background

Brown v Mississippi
56 S. Ct. 461 (1936)

1) Constitutional considerations

a. 5th and 14th Amendment due process

b. 5th Amendment protection against self-incrimination, and

c. 6th Amendment right to counsel

Texas v Cobb
121 S. Ct. 1335 (2001)

- Attaches only to charged offenses

Colorado v Connelly
107 S. Ct. 515 (1986)

2) Sole concern of 5th Amendment is governmental coercion; coercive activity by private party does not render confession inadmissible

St v Agnello
226 Wis. 2d 164 (1999)
Lang v St
178 Wis. 114 (1922)

3) Truthfulness of confession not relevant and plays no role in determining whether confession was voluntary

B. Standards to be applied

Lynumn v Illinois
83 S. Ct. 917 (1963)
St v Ward
2009 WI 60
318 Wis. 2d 301
St v Hunt
53 Wis. 2d 734, 740
(1972)

1) Ultimate question is whether confession was voluntary product of free and unconstrained will, reflecting deliberateness of choice, and not coerced or product of improper police pressure

St v Lemoine
2013 WI 5
345 Wis. 2d 171
St v Hoppe
2003 WI 43
261 Wis. 2d 294
St v Clappes
136 Wis. 2d 222 (1987)

2) "Totality of circumstances" test balances personal characteristics of Def against police pressures applied

Phillips v St
29 Wis. 2d 521, 530
(1966)

3) Line between coercion and voluntariness hard to draw, so use sense of fairness and justice to find "in totality of circumstances"

St v Hoyt
21 Wis. 2d 310 (1963)

4) When police have substantial evidence of Def's guilt when interrogation begins, resolve ambiguities in favor of suppression

Arizona v Fulminante
111 S. Ct. 1246 (1991)
Colorado v Connelly
107 S. Ct. 515 (1986)
St v Clappes
136 Wis. 2d 222, 241
(1987)

5) Primary concern is coercive government activity. Finding of involuntariness requires evidence of improper police practice deliberately used to obtain confession

6) Focus on any impairment of Def's mental freedom

St v Hoyt
21 Wis. 2d 284 (1964)

a. Attempt should be made to recreate Def's psychological response to circumstances and apply to legal standards

St v Wedgeworth
100 Wis. 2d 514, 525–26
(1981)
Crummel v St
46 Wis. 2d 348 (1970)

b. That Def spoke imprudently or out of remorse and later regrets making statement does not vitiate otherwise voluntary statement

Blaszke v St
69 Wis. 2d 81, 89–91
(1975)

c. Self-imposed internal coercion not basis for finding involuntariness

St v Albrecht
184 Wis. 2d 287
(Ct. App. 1994)
St v Drogsvold
104 Wis. 2d 247, 274
(Ct. App. 1981)

d. Statement not rendered involuntary by fact that Def seeking benefit through confession

3. Involuntary Confessions—Police Tactics

Rawlings v Kentucky
100 S. Ct. 2556 (1980)
Reck v Pate
81 S. Ct. 1541 (1961)
Wagner v St
89 Wis. 2d 70 (1979)

A. Length of time Def in custody and delay before arraignment

St v Herrington
41 Wis. 2d 757 (1969)
Phillips v St
29 Wis. 2d 521 (1966)

1) Long detentions looked on with disfavor and may result in exclusion; purpose and nature of detention are significant

St v Hunt
53 Wis. 2d 734, 745
(1972)
Phillips v St
29 Wis. 2d 521, 535
(1966)
St v Whitman
160 Wis. 2d 260
(Ct. App. 1991)

B. Allowing Def outside communication

Arizona v Fulminante
111 S. Ct. 1246, 1253
(1991)

C. Threats to Def

St v Deets
187 Wis. 2d 630
(Ct. App. 1994)

1) But mere expression of skepticism is not coercive

St v Brockdorf
2006 WI 76
291 Wis. 2d 635

2) Statements given under threat of discharge from public employment may be deemed compelled

St v Clappes
136 Wis. 2d 222, 239

(1987)
Phillips v St
29 Wis. 2d 521, 530
(1966)

D. Relays of investigators

Bradley v St
36 Wis. 2d 345 (1967)
Woods v Clusen
794 F2d 293
(7th Cir 1986)

E. Showing Def victims of crime

Culombe v Connecticut
81 S. Ct. 1860 (1961)
St v La Fernier
37 Wis. 2d 365 (1967)

F. Psychological coercion inherent in custodial interrogation

St v Hockings
86 Wis. 2d 709 (1979)
St v Verhasselt
83 Wis. 2d 647 (1978)

G. Giving *Miranda* warnings to custodial Def

Hill v St
91 Wis. 2d 315
(Ct. App. 1978)

H. Physical abuse

Turner v St
76 Wis. 2d 1 (1977)
Pontow v St
58 Wis. 2d 135, 139
(1973)
St v Nicholson
187 Wis. 2d 688
(Ct. App. 1994)
St v Deets
187 Wis. 2d 630
(Ct. App. 1994)
St v Edwardsen
135 Wis. 2d 208
(Ct. App. 1986)

I. Promise of leniency

1) Admissible if result of confession bargain

2) Inadmissible if result of plea bargain (§ 904.10)

3) Inadmissible if police promise leniency, but police can explain that cooperation will benefit Def

St v Reynolds
2010 WI App 56
324 Wis. 2d 385

J. Length of interrogation

Fay v Noia
83 S. Ct. 822 (1963)

K. General conditions under which interrogation took place

St v Schlise
86 Wis. 2d 26 (1978)

L. Prior coerced confessions

Brewer v Williams
97 S. Ct. 1232 (1977)

M. Police stratagems

Turner v St
76 Wis. 2d 1 (1977)

N. Confronting Def with evidence against him or her

St v Triggs
2003 WI App 91
264 Wis. 2d 861
St v Albrecht
184 Wis. 2d 287
(Ct. App. 1994)

O. Deceit or misrepresentation

St v Reynolds
2010 WI App 56, ¶ 50
324 Wis. 2d 385

P. Appeals to suspect's conscience

St v Vice
2021 WI 63
397 Wis. 2d 682

Q. Referring to and confronting Def with polygraph test results during interrogation

4. Involuntary Confessions—Suspect's Personal Characteristics

Phillips v St
29 Wis. 2d 521 (1966)

A. Need for water and nourishment

St v Wallace
59 Wis. 2d 66, 81 (1973)
Renner v St
39 Wis. 2d 631, 636
(1968)
St v Williams
220 Wis. 2d 458
(Ct. App. 1998)

B. Physical and emotional condition

St v Clappes
136 Wis. 2d 222 (1987)
St v Bullock
2014 WI App 29
353 Wis. 2d 202

1) Mere existence of physical pain or intoxication insufficient to render statement involuntary

St v Hunt
53 Wis. 2d 734 (1972)

2) Deprivation of sleep

St v Bergenthal
47 Wis. 2d 668, 679
(1970)
St v Shaffer
96 Wis. 2d 531
(Ct. App. 1980)

3) Drunkenness

St v Hoppe
2003 WI 43
261 Wis. 2d 294

4) Alcohol withdrawal and withholding of medication to deal with tremors may be relevant, along with length of interviews and lack of *Miranda* warnings

St v Moore
2015 WI 54
363 Wis. 2d 376
St v Verhasselt
83 Wis. 2d 647 (1978)
St v Cumber
130 Wis. 2d 327
(Ct. App. 1986)

C. Age, education, intelligence, and understanding of Def

St v Moore
2015 WI 54, ¶¶ 57–61
363 Wis. 2d 376

1) The younger the Def, the more carefully the Ct must scrutinize the confession, but the confession of a 15 year old with considerable experience with police custody is not involuntary merely because of the Def's age or below-average intellect

Lynumn v Illinois
83 S. Ct. 917 (1963)
St v Hoppe
2003 WI 43, ¶ 39
261 Wis. 2d 294

D. Previous experience with police

St v Owens
148 Wis. 2d 922 (1989)

E. Def's subjective belief in promises made not dispositive

St v Hockings
86 Wis. 2d 709 (1979)

F. Whether Def received *Miranda* warnings

5. Involuntary Statements of Witnesses, Not Suspects

St v Samuel
2002 WI 34
252 Wis. 2d 26

A. Def may seek to suppress allegedly involuntary statement of witness to police. Involuntariness of witness statement requires:

1) Egregious police conduct,

2) Witness statement that is unreliable as matter of law, and

3) Involuntariness under totality of circumstances

6. *Miranda* Rights Generally

Miranda v Arizona
86 S. Ct. 1602 (1966)
St v Mitchell
167 Wis. 2d 672 (1992)

A. Warnings necessary to help accused overcome inherent pressures of custodial interrogation atmosphere

B. Two key questions

1) Was Def in custody?

2) Was Def interrogated?

3) If answer to both questions is yes, *Miranda* requirement must be satisfied

C. Sufficiency of *Miranda* Warnings

Jones v St
69 Wis. 2d 337, 343–44
(1975)
St v Backstrom
2006 WI App 114
293 Wis. 2d 809

1) Substance, not form controls

California v Prysock
101 S. Ct. 2806 (1981)
St v Fillyaw
104 Wis. 2d 700 (1981)

2) Warnings need not follow ritualistic formula repeated without variation

St v Santiago
206 Wis. 2d 3 (1996)
St v Hindsley
2000 WI App 130
237 Wis. 2d 358

3) Special consideration and attention should be given to non-English-speaking or deaf Def, including preserving *Miranda* warning in foreign language and possible need for multiple interpreters to meet particular needs of Def

Florida v Powell
130 S. Ct. 1195 (2010)

4) Standard warnings are adequate even though they do not explicitly state that suspect has the right to have counsel present during questioning

St v Jackson
229 Wis. 2d 328
(Ct. App. 1999)

5) Can tell indigent Def that Atty will be appointed once charged with crime or at trial, so long as told no need to say anything until Atty appointed and interrogation terminated unless reinitiated by Def with waiver of counsel

St v Mitchell
167 Wis. 2d 672 (1992)
McClellan v St
53 Wis. 2d 724, 730
(1972)

6) Right to terminate questioning or consult with Atty at any time during interrogation is mandatory procedural requirement, but no warning required

Miranda v Arizona
86 S. Ct. 1602 (1966)

D. Waiver of *Miranda* rights

St v Santiago
206 Wis. 2d 3 (1996)
St v Jones
192 Wis. 2d 78 (1995)
St v Reiholec
2021 WI App 45, ¶ 19
398 Wis. 2d 729

1) State must show by preponderance of evidence that Def was adequately informed of *Miranda* rights, including privilege against self-incrimination and right to counsel, and that Def knowingly, voluntarily, and intelligently waived them

Schultz v St
82 Wis. 2d 737, 748
(1978)

2) State makes prima facie showing of valid waiver by demonstrating Def has been told or read rights, indicates understanding, and is willing to make statement

Berghuis v Thompkins
130 S. Ct. 2250 (2010)

3) Waiver may be express or implied

Miranda v Arizona
86 S. Ct. 1602, 1628 (1966)

a. No implied waiver simply from silence after warnings given or fact that confession eventually obtained

N Carolina v Butler
99 S. Ct. 1755 (1979)
Jordan v St
93 Wis. 2d 449, 465
(1980)
Woods v Clusen

794 F2d 293
(7th Cir 1986)

b. Silence, understanding of rights, and conduct consistent with waiver may support finding of intelligent and understanding waiver of rights by Def

St v Reiholec
2021 WI App 45, ¶ 31
398 Wis. 2d 729

4) Evidence that State misled Def as to rights will invalidate waiver

Miranda v Arizona
86 S. Ct. 1602, 1629 (1966)

5) Evidence that Def was threatened, tricked, or cajoled will invalidate waiver

St v Schilling
86 Wis. 2d 69, 86 (1978)

6) Def's misapprehension of the law does not vitiate otherwise-valid waiver

St v Beaver
181 Wis. 2d 959
(Ct. App. 1994)

7) Intoxication of Def does not per se vitiate an otherwise-valid waiver

7. *Miranda* Rights Inapplicable—Suspect Not in Custody

Stansbury v California
114 S. Ct. 1526 (1994)
Miranda v Arizona
86 S. Ct. 1602 (1966)
St v Bartelt
2018 WI 16, ¶ 31
379 Wis. 2d 588
St v Hassel
2005 WI App 80
280 Wis. 2d 637

A. *Miranda* applies after person taken into custody or otherwise deprived of freedom of action in any significant way (of degree associated with formal arrest)

Berkemer v McCarty
104 S. Ct. 3138 (1984)
St v Uhlenberg
2013 WI App 59
348 Wis. 2d 44

B. Test is objective, reasonable person analysis, from viewpoint of suspect, not subjective test

St v Koput
142 Wis. 2d 370 (1988)
St v Mosher
221 Wis. 2d 203
(Ct. App. 1998)

1) Police officer's plan to arrest, or possession of arrest warrant, if not communicated to suspect, has no bearing on question of "custody" or reasonable person analysis

St v Quigley
2016 WI App 53, ¶ 42
370 Wis. 2d 702

2) Suspect's non-objective belief that a probation hold will be placed after questioning is irrelevant

C. Circumstances suggesting suspect is in custody

St v Gruen
218 Wis. 2d 581, 594
(Ct. App. 1998)

1) Suspect is not free to leave

St v Quigley
2016 WI App 53, ¶ 38
370 Wis. 2d 702

2) Suspect is questioned about suspected crimes

Beckwith v US
96 S. Ct. 1612 (1976)
St v Bartelt
2018 WI 16, ¶ 44
379 Wis. 2d 588

a. That suspect is focus of investigation and is confronted with incriminating evidence is not dispositive

St v Bartelt
2018 WI 16, ¶ 53
379 Wis. 2d 588

b. Confessing to the crime does not necessarily transform a noncustodial interrogation into a custodial interrogation

St v Kilgore
2016 WI App 47, ¶¶ 21–34, 370 Wis. 2d 198
St v Goetz
2001 WI App 294, ¶¶ 12–17, 249 Wis. 2d 380

c. Occupant detained on premises during execution of search warrant may or may not be in custody

St v Quigley
2016 WI App 53, ¶ 39
370 Wis. 2d 702

3) Suspect is patted down before questioning

St v Morgan
2002 WI App 124, ¶¶ 12, 18, 254 Wis. 2d 602

4) Suspect is outnumbered by officers

St v Morgan
2002 WI App 124, ¶¶ 12, 17, 254 Wis. 2d 602

5) Officer's gun is drawn

St v Quigley
2016 WI App 53, ¶ 39
370 Wis. 2d 702

6) Suspect is transported to interview room in locked police vehicle

St v Halverson
2021 WI 7, ¶ 30
395 Wis. 2d 385

7) Suspect is handcuffed

St v Dobbs
2020 WI 64, ¶ 63
392 Wis. 2d 505

8) Length of questioning is longer than 30 minutes

D. Circumstances suggesting suspect is not in custody

Berkemer v McCarty
104 S. Ct. 3138, 3150
(1984)
St v Martin
2012 WI 96
343 Wis. 2d 278
St v Gruen
218 Wis. 2d 581
(Ct. App. 1998)
Village of Menomonee Falls v Kunz
126 Wis. 2d 143, 149–51
(Ct. App. 1985)

1) General on-the-scene questioning, or during *Terry* stop or traffic stop, or questioning to determine need for assistance

St v Quigley
2016 WI App 53, ¶ 40
370 Wis. 2d 702

2) Police tell suspect he or she is not under arrest or is free to leave; this factor is "one of the most important"

St v Quigley
2016 WI App 53, ¶ 41
370 Wis. 2d 702

3) Suspect understands he or she is not under arrest; this factor is "highly significant"

Oregon v Mathiason
97 S. Ct. 711, 713–14
(1977)
St v Bartelt
2018 WI 16, ¶ 38,
379 Wis. 2d 588

4) Suspect comes to police station voluntarily

St v Quigley
2016 WI App 53, ¶ 39
370 Wis. 2d 702

5) Suspect agrees to speak with police

St v Quigley
2016 WI App 53, ¶ 39
370 Wis. 2d 702

6) Suspect is not restrained

St v Quigley
2016 WI App 53, ¶ 39
370 Wis. 2d 702

7) Interview room unlocked

St v Farias-Mendoza
2006 WI App 134 ,¶ 23

294 Wis. 2d 726

a. Suspect considered in custody if left in a locked room for a long time, even if not aware room is locked

St v Quigley
2016 WI App 53, ¶ 38
370 Wis. 2d 702

8) Tone of questioning not confrontational or accusatory

St v Quigley
2016 WI App 53, ¶ 38
370 Wis. 2d 702

9) Questioning not lengthy

Oregon v Mathiason
97 S. Ct. 711, 714 (1977)

10) Suspect allowed to leave after questioning

St v Bartelt
2018 WI 16, ¶ 38
379 Wis. 2d 588

11) Suspect is permitted to answer and check his or her phone during interview

Howes v Fields
132 S. Ct. 1181(2012)
St v Halverson
2021 WI 7, ¶ 4
395 Wis. 2d 385

E. Suspect already incarcerated on another charge is not per se in custody for *Miranda* purposes; Ct must analyze totality of circumstances described above in Secs. 7.C. & 7.D.

South Dakota v Neville
103 S. Ct. 916 (1983)

F. Warnings not required before request to take blood alcohol test

St v Knapp,
111 Wis. 2d 380, 385–88
(Ct. App. 1983)

G. Warnings not required for PSI, provided investigation not accusatorial in nature

H. Hospital questioning

St v Torkelson
2007 WI App 272
306 Wis. 2d 673

1) Not in custody while unrestrained during short wait for ambulance

St v Clappes
117 Wis. 2d 277 (1984)
St v Schambow
176 Wis. 2d 286
(Ct. App. 1993)

2) Not in custody while doctors treating

Scales v St
64 Wis. 2d 485 (1974)
St v Buck

210 Wis. 2d 115
(Ct. App. 1997)

3) In custody following arrest at scene of crime, in ambulance or in hospital

St v Schloegel
2009 WI App 85
319 Wis. 2d 741

I. Warnings not required for questioning of student at school by school officials if school liaison officer is merely present

St v Hanson
2019 WI 63
387 Wis. 2d 233

J. Warnings not required for questioning of witness at John Doe proceeding (but John Doe Judge should address witness in accordance with Wis JI-Cr SM-12, which advises witness of right against self-incrimination and right to consult counsel—*See* CR 48, John Doe Proceedings, Sec. 2.E.)

New York v Quarles
104 S. Ct. 2626 (1984)

K. Public safety exception

St v Uhlenberg
2013 WI App 59
348 Wis. 2d 44
St v Stearns
178 Wis. 2d 845
(Ct. App. 1993)

1) *Miranda* does not apply to questions necessary to secure officer's safety or safety of public or Def, as opposed to questions designed to elicit testimonial evidence

St v Grady
2009 WI 47
317 Wis. 2d 344

L. Warnings given during noncustodial interrogation need not be repeated when interrogation becomes custodial

8. *Miranda* Rights Inapplicable—Suspect Not Being Interrogated

Rhode Island v Innis
100 S. Ct. 1682 (1980)
St v Hambly
2008 WI 10
307 Wis. 2d 98
St v Douglas
2013 WI App 52
347 Wis. 2d 407
St v Morgan
2002 WI App 124
254 Wis. 2d 602
St v Badker
2001 WI App 27
240 Wis. 2d 460

A. Interrogation not limited to express questioning of Def

1) Brevity of exchange is not controlling in determining whether an interrogation has taken place

2) Includes words and actions of police they know are reasonably likely to elicit incriminating response from suspect

3) Focus on perceptions of suspect, not intent of police

4) Test one of "objective foreseeability"—i.e., would objective observer foresee incriminating response elicited? Also includes officer's knowledge of Def's susceptibility

Roney v St
44 Wis. 2d 522, 531–32
(1969)
St v Hockings
86 Wis. 2d 709, 716
(1979)
Martin v St
87 Wis. 2d 155, 165–66
(1979)

B. Custodial statements volunteered (not in response to questioning) admissible without warnings

1) Distinction between being able to talk with police and interrogation

McClellan v St
53 Wis. 2d 724, 732
(1972)

2) Def's "braggadocio" while in custody deemed voluntary

St v Isham
70 Wis. 2d 718, 731
(1975)

C. No warnings required when Def's voice used only to establish voice levels and characteristics

Pennsylvania v Muniz
110 S. Ct. 2638 (1990)
St v Stevens
181 Wis. 2d 410 (1994)
St v Bryant
2001 WI App 41
241 Wis. 2d 554

D. Routine booking questions not interrogation, but only if in actual process of booking

St v Harris
2017 WI 31, ¶ 22
374 Wis. 2d 271

E. Asking suspect whether the suspect is willing to give a statement is not reasonably likely to elicit an incriminating response and therefore does not constitute interrogation

St v Fischer
2003 WI App 5
259 Wis. 2d 799

F. Police responding to Def's questions after telling Def they wanted to talk with him about crime while in custody is not interrogation

9. Determining Whether Suspect Effectively Invoked *Miranda* Rights

Oregon v Bradshaw
103 S. Ct. 2830 (1983)
Edwards v Arizona
101 S. Ct. 1880 (1981)

A. Def's requests to remain silent or consult with Atty must be scrupulously honored to protect full exercise of 5th and 6th Amendment privileges

St v Coerper
199 Wis. 2d 216 (1996)
St v Jones
192 Wis. 2d 78 (1995)

B. Right to silence or counsel must be personally requested by Def to be valid

C. If Def requests to remain silent, all questions must cease

St v Hampton
2010 WI App 169
330 Wis. 2d 531
St v Hassel
2005 WI App 80
280 Wis. 2d 637
St v Ross
203 Wis. 2d 66
(Ct. App. 1996)

1) Request for silence must be clear and unequivocal

St v Owen
202 Wis. 2d 620
(Ct. App. 1996)
St v Wright
196 Wis. 2d 149
(Ct. App. 1995)

2) Refusal to answer one specific question or to speak to one officer may not constitute request to remain silent

Michigan v Mosley
96 S. Ct. 321 (1975)
St v Badker
2001 WI App 27
240 Wis. 2d 460

3) Def can reinitiate interrogation

St v Turner
136 Wis. 2d 333 (1987)
St v Hartwig
123 Wis. 2d 278, 284
(1985)
St v Pheil
152 Wis. 2d 523
(Ct. App. 1989)

4) Police may reinitiate interrogation if "scrupulously honor" Def's right to silence—Ct applies five-factor test of *Mosley* as framework for analysis

a. Original interrogation promptly terminated

b. Second interrogation resumed only after a passage of significant period of time

c. Readministration of rights at outset of second interrogation

d. Different officer resumed questioning

e. Second interrogation limited to crime that was not subject of earlier interrogation

Oregon v Bradshaw
103 S. Ct. 2830 (1983)
Edwards v Arizona
101 S. Ct. 1880 (1981)
St v Lampe
119 Wis. 2d 206 (1984)
St v Hampton
2010 WI App 169
330 Wis. 2d 531

D. If Def requests Atty, all questioning must cease

Edwards v Arizona
101 S. Ct. 1880 (1981)
St v Jones
192 Wis. 2d 78 (1995)

1) Def may initiate further communication with police

a. If Def initiates new contact, police may only listen to voluntary statement (and not interrogate) unless new waiver taken

b. Police may not use third-party agent to instigate Def's further communication with police

St v Lee
122 Wis. 2d 266 (1985)
St v Nicholson
187 Wis. 2d 688
(Ct. App. 1994)

- See *Lee* and *Nicholson* cases for criteria to determine whether third party is agent of police

Maryland v Shatzer
130 S. Ct. 1213 (2010)
St v Edler
2013 WI 73
350 Wis. 2d 1

2) Police may reinitiate questioning if there has been a "break in custody" that lasts at least 14 days (e.g., suspect is released from custody or transferred to a general prison population where suspect is no longer isolated in police custody)

St v Hampton
2010 WI App 169
330 Wis. 2d 531

3) If Def requests Atty, police cannot interrogate, but can ask simple questions with goal of accommodating demand for counsel

St v Coerper
199 Wis. 2d 216 (1996)
St v Badker
2001 WI App 27
240 Wis. 2d 460

4) *Edwards* request for Atty under 5th Amendment applies to all cases, whereas request for counsel under 6th Amendment is "offense-specific," *but see Texas v Cobb*, 121 S. Ct. 1335 (2001), or may be applied to a "closely related" case

Davis v US
114 S. Ct. 2350 (1994)
St v Conner
2012 WI App 105
344 Wis. 2d 233
St v Jennings
2002 WI 44
252 Wis. 2d 228

E. *Edwards* rule invoked by clear and unequivocal request for counsel

St v Abbott
2020 WI App 25, ¶ 36
392 Wis. 2d 232

1) Def's personal characteristics, including mental state, do not relax requirement that right to counsel be invoked with unambiguous and unequivocal statement

Smith v Illinois
105 S. Ct. 490 (1984)

2) Any responses made by Def after clear and unequivocal request for counsel are relevant only to distinct question of later waiver of right to counsel and not relevant to clarity of initial request itself

F. *Edwards* rule not invoked by equivocal or ambiguous request

St v Jennings
2002 WI 44
252 Wis. 2d 228

1) Request is ambiguous if, in light of the circumstances, a reasonable officer would understand only that the suspect *might* be invoking the right to counsel

Davis v US
114 S. Ct. 2350 (1994)

2) Test is objective; suspect need not "speak with the discrimination of an Oxford don"

St v Edler
2013 WI 73
350 Wis. 2d 1

3) "Can my Atty be present for this?" is sufficiently clear to a reasonable officer

Davis v US
114 S. Ct. 2350 (1994)

4) "Maybe I should talk to a lawyer" is not clear and unequivocal

St v Abbott
2020 WI App 25, ¶ 33
392 Wis. 2d 232

5) I don't want to get in trouble with [my attorney]," "Ask [my attorney] if it's okay," and "[my attorney] said to have him here" are not clear and unequivocal

St v Cummings
2014 WI 88, ¶¶ 53–59
357 Wis. 2d 1

6) "Well, then, take me to my cell. Why waste your time? Ya know?" is not clear and unequivocal; it constitutes mere "verbal 'fencing'" with police

St v Cummings
2014 WI 88, ¶¶ 60–69
357 Wis. 2d 1

7) "I don't want to talk about this" is equivocal because it is unclear whether suspect is declining to answer questions or cutting off questioning altogether

Jones v Cromwell
75 F4th 722, 726
(7th Cir 2023)

8) "So y'all can get a public 'pretender' right now?" is equivocal because it is unclear if suspect is asking whether Atty could be contacted at that moment or is asking that Atty actually be produced

St v Coerper
199 Wis. 2d 216 (1996)

9) Simply retaining counsel is not clear and unequivocal

St v Rodgers
203 Wis. 2d 83
(Ct. App. 1996)

10) Telling another, in the presence of police, to call for a lawyer is not clear and unequivocal

St v Fischer
2003 WI App 5
259 Wis. 2d 799

11) Conditional and futuristic request for counsel ("if you read me my rights, I won't talk") is not clear and unequivocal

St v Subdiaz-Osorio
2014 WI 87
357 Wis. 2d 41

12) Inquiry about how to obtain counsel, which could have been interpreted as request for representation at some proceeding other than the interrogation, was not clear and unequivocal

Montejo v Louisiana
129 S. Ct. 2079 (2009)
St v Delebreau
2015 WI 55
362 Wis. 2d 542

G. Retention of counsel does not automatically bar interrogation; Def may waive right to have Atty present during questioning

Moran v Burbine
106 S. Ct. 1135 (1986)

H. No need to inform of Atty's efforts to reach suspect when Atty hired by relatives without suspect's knowledge

Moran v Burbine
106 S. Ct. 1135 (1986)

1) Third parties may not assert Def's rights and no need to notify Def that Atty has been hired

St v Jones
192 Wis. 2d 78 (1995)
St v Hanson
136 Wis. 2d 195 (1987)

2) Same result when SPD seeks to represent accused without request from accused personally

10. Other Grounds for Suppression

Massiah v U.S.
84 S. Ct. 1199 (1964)

A. Confessions resulting from 6th Amendment violations

St v Lewis
2010 WI App 52, ¶ 1
324 Wis. 2d 536

1) After Def is formally charged, State may not interrogate Def in absence of counsel or valid waiver of counsel

Jordan v St
93 Wis. 2d 449, 465
(1980)

2) Standard for waiving right to counsel under 6th Amendment is same as standard under 5th Amendment

State has burden to prove knowing and voluntary waiver of right

US v Henry
100 S. Ct. 2183 (1980)
St v Lewis
2010 WI App 52
324 Wis. 2d 536

3) State may not deliberately elicit incriminating statements from Def through use of surreptitious government agents (e.g., a fellow jail cellmate or confidential informant)

St v Arrington
2022 WI 53
402 Wis. 2d 675
cert denied
143 S. Ct. 411 (2022)

Whether third party is acting as government agent is fact specific based on extent of government's control and direction of third party

B. "Sew-up" confessions

Phillips v St
29 Wis. 2d 521, 535
(1966)
St v Bean
2011 WI App 129, ¶¶ 15–
25, 337 Wis. 2d 406

1) Considering totality of circumstances, detention for unreasonably long period violates due process and renders inadmissible any confession obtained during period

St v Benoit
83 Wis. 2d 389, 404–05
(1978)
St v Bean

2011 WI App 129, ¶¶ 15–25, 337 Wis. 2d 406

2) Mere fact that State had sufficient evidence to sustain charge at time Def arrested and interrogated does not render confession an illegal "sew-up"

a. Sole question is whether delay in charging was inordinate and detention illegal

St v Bean
2011 WI App 129, ¶¶ 15–25, 337 Wis. 2d 406

b. If police continue to "move forward" with the investigation, the length of the detention is not unreasonable

Dunaway v New York
99 S. Ct. 2248 (1979)
Brown v Illinois
95 S. Ct. 2254 (1975)

C. Confessions that are fruit of illegal arrest

St v Anderson
165 Wis. 2d 441 (1991)

1) General rule: Statement is inadmissible, unless sufficiently attenuated from the taint

St v Phillips
218 Wis. 2d 180 (1998)
St v Anderson
165 Wis. 2d 441 (1991)

2) Attenuation factors include

a. Time between arrest and confession

b. Intervening circumstances

c. Purpose and flagrancy of official misconduct

St v Felix
2012 WI 36, ¶ 42
339 Wis. 2d 670

3) Narrow exception when statement is admissible and attenuation analysis not necessary: if police have probable cause to arrest Def before unlawful entry and warrantless arrest from Def's home, such violation does not require suppression of evidence obtained from Def outside the home, including statements obtained after Def was given and waived *Miranda* rights

D. Confessions that are fruit of prior inadmissible statements

Miranda v US
86 S. Ct. 1602 (1966)
Harney v US
407 F2d 586, 590 (5th Cir 1969)
St v Schlise
86 Wis. 2d 26 (1978)

1) Admissibility of subsequent confession determined on ad hoc basis for causal relationship between earlier unconstitutional conduct and subsequent statement

2) Need to suppress subsequent statement greater when exclusion of earlier statement due to finding of coercion or involuntariness

Oregon v Elstad
105 S. Ct. 1285 (1985)
St v Armstrong
223 Wis. 2d 331 (1999)
overruling on other
grounds recognized by
St v Halverson
2021 WI 7, ¶ 21
395 Wis. 2d 385

3) Although prior voluntary, unwarned statement must be suppressed, subsequent voluntary confession with full warnings and waivers admissible

E. Confessions that are result of "outrageous government conduct"

St v Albrecht
184 Wis. 2d 287
(Ct. App. 1994)

1) Defense must show following

a. Violation of specific constitutional right

b. Violation of fundamental fairness

c. Acts shocking to the universal sense of justice mandated by due process

F. Compelled confessions

Minnesota v Murphy
104 S. Ct. 1136 (1984)

1) Probationer has the 5th Amendment privilege against compelled self-incrimination

St v Sahs
2013 WI 51
347 Wis. 2d 641

2) Burden on probationer to show that questioning required choosing between making incriminating statements and jeopardizing liberty by remaining silent

Kastigar v US
92 S. Ct. 1653 (1972)
St v Quigley
2016 WI App 53, ¶ 42
370 Wis. 2d 702

3) State may not use evidence derived from compelled testimony; i.e., use compelled testimony as a lead to other evidence; burden is on State to show evidence is derived from a wholly independent source

G. Use of physical, nontestimonial evidence derived from a suppressed confession

St v Knapp
2005 WI 127
285 Wis. 2d 86

1) Intentional *Miranda* violation requires suppression of nontestimonial evidence obtained as result of confession, as fruit of the poisonous tree

a. *Knapp* holds that Wisconsin's constitution affords broader protection than the US Constitution. *Compare US v Patane*, 124 S. Ct. 2620 (2004)

b. Violation in *Knapp* consisted of a detective deliberately questioning a suspect without *Mirandizing* him first so as to "keep the lines of communication open"

St v Knapp
2005 WI 127, ¶¶ 75–81,
285 Wis. 2d 86
Compare US v Patane
124 S. Ct. 2620 (2004)
See St v Knapp
2005 WI 127, ¶ 38,
285 Wis. 2d 86

2) *Knapp* suggests but does not explicitly hold that the fruits of an intentional *Miranda* violation are inadmissible even if the confession is not used in the case-in-chief

See St v Knapp
2005 WI 127
285 Wis. 2d 86

3) *Knapp* did not decide effect of negligent *Miranda* violation

Harris v New York
91 S. Ct. 643 (1971)
St v Knapp
2003 WI 121
265 Wis. 2d 278
vacated on other grnds by
St v Knapp
124 S. Ct. 2932 (2004)

4) If, despite intentional *Miranda* violation, statement is voluntary, statement may be used in rebuttal for impeachment

§ 938.31(3)(c)5.
St v Joel I-N
(In Int of Joel I-N)
2014 WI App 119
358 Wis. 2d 404

5) Juv's confession need not be recorded if "exigent public safety" issue renders recording infeasible, for example, if a suspect in an armed robbery is in an ambulance on the way to the hospital, recording equipment is not available, and a concern for public safety warrants immediately questioning the suspect about other armed robbers still at large

§ 938.31(3)
St v Jerrell CJ
(In Int of Jerrell CJ)
2005 WI 105,

¶¶ 57 n14, 58,
283 Wis. 2d 145

H. Use of unrecorded statements of Juvs

1) *Jerrell* Ct, invoking its supervisory powers, ordered that "all custodial interrogation of Juvs in future cases shall be electronically recorded where feasible and without exception when questioning occurs at a place of detention"

2) In response to fear that confessions may be lost to technicalities, Ct noted that it might excuse "failure to record when that failure was occasioned by good-faith error or equipment malfunction or where the violation was not substantial or the contents of the interrogation were not in dispute"

St v Dionicia M
(In Int of Dionicia M)
2010 WI App 134
329 Wis. 2d 524

3) If recording of entire interrogation is feasible, partial recording is inadmissible

§ 938.31(3)(c)
§ 972.115(2)(a)
St v Moore
2015 WI 54
363 Wis. 2d 376

4) Unrecorded statement may be inadmissible even if recording stopped at suspect's request; alternatively, remedy may consist of admitting statement but instructing jury that in determining weight to be given the statement it may consider the fact that confession was not recorded; *Moore* leaves open the question which remedy applies

CR 22: JURY WAIVER

1. Waiver of Jury

§ 972.02(1)
St v Anderson
2002 WI 7
249 Wis. 2d 586
St v Cloud
133 Wis. 2d 58
(Ct. App. 1986)

A. Must be done in writing or by statement in open Ct, on record, with approval of Ct and consent of State

§ 967.08(2)

1) Waiver may be by telephone or live audiovisual means upon consent of Def and State

2) Obtain consent of State to waiver

St v Cook
141 Wis. 2d 42
(Ct. App. 1987)

a. State not required to justify refusal to consent to waiver of jury

St v Murdock
2000 WI App 170
238 Wis. 2d 301

- State may refuse to consent to either phase of a bifurcated trial

b. Def has no constitutional right to waive jury trial

St v Burks
2004 WI App 14
268 Wis. 2d 747

3) Ct need not approve waiver or explain Ct's reason for withholding approval

St v Villarreal
153 Wis. 2d 323
(Ct. App. 1989)
overruled in part by
State v Smith
2012 WI 91
342 Wis. 2d 710

B. Right to jury trial is personal, fundamental constitutional right

1) Can be waived only by Def personally

a. On record

b. In voluntary and intelligent manner

St v Anderson
2002 WI 7
249 Wis. 2d 586

C. Requires personal colloquy with Def; silent acquiescence not sufficient. Ct to

Krueger v St
84 Wis. 2d 272, 282
(1978)
White v St
45 Wis. 2d 672, 682–83
(1970)

1) Address Def personally

Warrix v St
50 Wis. 2d 368 (1971)

2) Be certain Def understands what jury is and that Def giving up right to jury trial

St v Resio
148 Wis. 2d 687 (1989)
St v Grant
230 Wis. 2d 90
(Ct. App. 1999)

a. Ct must advise Def that jury verdict must be unanimous

St v Denman
2001 WI App 96

243 Wis. 2d 14

- Does not apply if Ch 980 petition

St v Hansford
219 Wis. 2d 226 (1998)

b. Def entitled to 12 jurors

3) Be certain waiver freely and intelligently made

St v De Leon
127 Wis. 2d 74
(Ct. App. 1985)

4) Complete waiver and make specific findings before dismissing jury panel and starting trial

D. Waiver of jury—suggested script

1) "Before your waiver of your constitutional right to a jury trial is accepted, I will ask you some questions to decide whether your waiver should be accepted. If you have any trouble understanding the questions, please tell me, and take all the time you need to confer with your Atty."

2) "Do you understand that you have a right to a jury trial, to have 12 people hear the testimony of all witnesses?"

St v Grant
230 Wis. 2d 90
(Ct. App. 1999)

3) "Do you understand that all 12 members of the jury must agree upon their verdict of guilty or not guilty or the Ct may not receive the verdict?"

4) "Do you understand that in a jury trial the State must prove you committed each of the 'parts' or 'elements' of the crime charged beyond a reasonable doubt to the satisfaction of all 12 jurors?"

5) "If the State fails to make that proof, you cannot be convicted of the crime charged."

6) "Do you realize that by giving up your right to a jury trial, you are agreeing that this Ct, after hearing all of the evidence will make a decision on whether or not you are guilty?"

7) "Has anyone promised you anything to give up your right to a jury trial?"

8) "Has anyone threatened you or used force of any kind to give up your right to a jury trial?"

9) "Knowing what I have just told you, do you still wish to give up your right to a jury trial?"

10) "Have you had enough time to discuss this with your Atty? Has your Atty explained your right to a jury trial to you?"

11) (To Def's Atty) "Do you believe the Def understands the right to a jury trial and is giving up that right voluntarily and intelligently?"

E. Make specific record in accepting waiver of jury trial

St v Livingston
159 Wis. 2d 561 (1991)

F. Remedy for inadequate waiver is new trial

1) Per se rule awards new trial if no personal waiver colloquy occurs

St v Grant
230 Wis. 2d 90
(Ct. App. 1999)

2) If personal colloquy occurs, Def must be granted postconviction hearing where Def can assert lack of knowledge as to alleged waiver

G. Waiver of jury as to element of offense

1) Prosecutor and defense Atty may stipulate to element of offense, however

St v Hauk
2002 WI App 226
257 Wis. 2d 579
St v Villarreal
153 Wis. 2d 323
(Ct. App. 1989)
overruled in part by
St v Smith
2012 WI 91
342 Wis. 2d 710

2) Def must personally waive right to have jury find element beyond a reasonable doubt

2. Withdrawal of Waiver of Jury

St v Cloud
133 Wis. 2d 58
(Ct. App. 1986)

A. Ct's discretion in allowing Def to withdraw waiver of jury should be liberally exercised

B. Factors to be considered

1) Def's reason for requesting withdrawal

2) Timing of request

3) Relevant changes of circumstances

4) Delay, inconvenience, or other adverse consequence of allowing withdrawal

5) Def's fundamental interest in right to trial by jury

6) Any unnecessary delay in disposition

7) Inconvenience to victims and witnesses

8) Prejudice to State

9) Interference, if any, with orderly administration of justice

C. Grant Def's motion to withdraw jury waiver unless showing made that allowing motion will substantially delay or impede cause of justice

§ 972.02(2)

3. Trial by Jury of Less Than Twelve

A. May be agreed to any time before verdict

B. Agreement must be in writing or by statement in open Ct, on record, with approval of Ct

St v Faucher
220 Wis. 2d 689
(Ct. App. 1998)
aff'd, 227 Wis. 2d 700
(1999)

C. Requires voluntary, intentional, and intelligent waiver of jury of 12

1) Cannot be result of a Hobson's choice

D. Requires agreement by State

CR 23: SELECTION OF JURY

1. Challenge to the Array

ABA Stds—Trial by Jury
§ 15-2.3 (1996)

A. Function and purpose

1) Dismissal of entire panel

2) Grounds: Material departure from requirements of law governing selection of jurors

B. Procedure

1) No express statutory provisions

Brown v St
58 Wis. 2d 158 (1973)
Ullman v St
124 Wis. 602 (1905)

2) Form of motion

a. Challenge array, or

b. Quash panel

US v Grose
525 F2d 1115
(7th Cir 1975)

3) Timeliness

a. Within discretion of Ct

Brown v St
58 Wis. 2d 158 (1973)

b. Generally before selecting specific petit jury

St v Burnett
30 Wis. 2d 375 (1966)

c. Challenge after commencement of trial not timely

St v Nutley
24 Wis. 2d 527 (1964)

d. Challenge on opening day of trial, but before jury selection, held timely

Wilson v St
59 Wis. 2d 269 (1973)
St v Coble
95 Wis. 2d 717
(Ct. App. 1980)
aff'd, 100 Wis. 2d 179
(1981)

C. Burden on Def to show

1) Prima facie case that panel not selected according to law, or

2) Distinctive group or class of persons systematically and intentionally excluded from jury service

St v Holmstrom
43 Wis. 2d 465 (1969)

D. Findings

1) Systematic exclusion of some representative unit of citizens from jury array, or

a. *See* **Purposeful Discrimination Against Jurors**, Sec. 7, *infra*

2) Disproportionate representation of unit of citizens on jury array over period of time

§ 805.08(1)

2. Role of Court and Parties

A. Judge has principal role in examination of jurors

SCR 71.01

B. Voir dire examination must be on the record

§ 971.04(1)(c)
St v Tulley
2001 WI App 236
248 Wis. 2d 505
St v Harris
229 Wis. 2d 832
(Ct. App. 1999)

C. Def and counsel must be present during voir dire, and these rights may not be waived

D. Either party may supplement Ct's examination

§ 805.08(1)

E. Give panel oath before voir dire examination

1) "Do you and each of you solemnly swear (or affirm) that you will true answers make to such questions as shall be put to you touching on your qualifications to act as jurors in the pending case, so help you God?"

St v Lepsch
2017 WI 27, ¶ 47
374 Wis. 2d 98

2) A panel of prospective jurors may be sworn by clerk before panel is brought to courtroom; Def's right to be present during jury selection does not include right to be present when oath is administered

Recommendation: In the interest of transparency, in order to avoid even the prospect of harmless error, and to make a clear record, administer the oath to prospective jurors in the courtroom on the record in the Def's presence.

St v Tucker
2003 WI 12
259 Wis. 2d 484

St v Britt
203 Wis. 2d 25
(Ct. App. 1996)

F. Provision of names and other identifying information about jurors is normally necessary

1) In threatening situation, jurors may be kept anonymous, with these requirements

a. Necessary to protect jurors

b. Reasonable precautions utilized to protect Def's right to fair and impartial jury

Hammill v St
89 Wis. 2d 404 (1979)

3. Form and Extent of Questions

A. Scope

1) Within sound discretion of Ct

2) Restrictions on inquiries subject to essential demands of fairness

B. Prohibited questions

1) Hypothetical questions

2) Repetitious questions

3) Misleading questions

4) Misinforming questions

5) Confusing questions

St v Ferron
219 Wis. 2d 481 (1998)

6) Badgering or harassing questions

7) Conversational or "visiting" questions designed to establish rapport with jury

Wis JI-Cr SM-20

C. Permitted questions

1) Acquaintance or relationship to parties and Attys

2) Acquaintance or relationship to possible witnesses

Skilling v US
130 S. Ct. 2896 (2010)

3) Prior knowledge concerning case, including media exposure

4) Interest in case or its outcome

5) Opinion concerning case

6) Bias or prejudice as to parties or issues in case

7) Hardship suffered by juror as result of being selected, taking into account anticipated length of trial

8) Personal reasons as to why juror prefers not to serve

St v Ferron
219 Wis. 2d 481 (1998)

9) Attitudes and understanding of basic principles of law in criminal case (e.g., presumption of innocence, burden of proof, right of Def not to testify, etc.)

Ham v S Carolina
93 S. Ct. 848 (1973)

10) Attitudes as to possible racial prejudice that might apply

D. Required questions

§ 805.08(1)
Powers v Ohio
111 S. Ct. 1364 (1991)

1) When racial bias likely to influence jury, inquiry must be made into such bias

E. Sensitive questions—procedure

1) Advance notice to Ct required, or

2) Individual voir dire used, or

Recommendation

3) Jurors advised they may respond privately in chambers

4. Judge's Voir Dire—Suggested Script

A. Jurors, I will ask you certain general questions pertaining to your qualifications to sit as jurors in this case. I will ask counsel to listen carefully to these general questions and not to repeat them. Counsel may ask the jurors generally any proper general questions and in addition may ask proper questions of each juror as to matters peculiar to such juror

§ 805.08(1)
St v Gesch
167 Wis. 2d 660 (1992)

B. If your answer to any of my questions is "Yes," please raise your hand

1) Is there anyone of you related by blood, marriage, or adoption to, or acquainted with, this Def, _____, sitting at defense table?

2) Do any of you know any member of Def's family or relations?

3) Do any of you know Def's Atty?

4) Have any of you had any business dealing with Def's Atty?

5) Do any of you know the Asst DA appearing for the State?

6) Do any of you know (here recite the names of all witnesses expected to testify in case)?

7) Have any of you any interest in this case or its outcome?

8) Is there any among you who has heard or read anything about this case?

St v Loukota
180 Wis. 2d 191
(Ct. App. 1993)

9) Is there any among you who has a feeling of any bias or prejudice for or against either party to this case?

10) Is there any among you who is a member of any police department, sheriff's department, or other law enforcement agency?

11) Is there any member of your immediate family or relation who is employed in a law enforcement related capacity?

12) Is there any among you who now has any opinion, or who has ever formed or expressed an opinion, as to the guilt or innocence of this Def?

13) Is there any among you who cannot or will not try this case fairly and impartially on the evidence that is given here in Court and under the instructions of the Court, and render a just and true verdict?

14) Any further questions appropriate to the particular case

5. Individual Voir Dire

A. When to use

1) Major case with substantial pretrial publicity

Mu'Min v Virginia
111 S. Ct. 1899 (1991)

a. Def does not have constitutional right to explore content of prejudicial pretrial publicity to which jurors exposed

b. Def only entitled to know whether juror can remain impartial in light of previously obtained information

2) Sensitive questions to be asked

3) Risk that juror's response will prejudice entire panel

St v Migliorino
150 Wis. 2d 513 (1989)
St v Koch
144 Wis. 2d 838 (1988)

B. Discretionary with Ct

1) Subject to essential element of fairness

2) Nature and content of pretrial publicity must be made known to Ct if Ct to weigh potential for effect on jurors

C. Factors for evaluating abuse of Trial Ct discretion in denying individual voir dire

1) Whether Ct conducts thorough initial questioning of panel members

2) Whether panel members reluctant to state if have preconceived notion of Def's guilt or innocence

3) Whether Ct imposes restrictions on extent of defense counsel's questioning

Recommendation

D. To save time, ask as many general voir dire questions as possible of entire panel before starting individual voir

dire

St ex rel LaCrosse Tribune v Cir Ct
115 Wis. 2d 220 (1983)

E. Individual voir dire still a public proceeding

§ 805.08(1)
§ 972.04(1)

6. Challenges for Cause

St v Mendoza
227 Wis. 2d 838, 847
(1999)

A. Def constitutionally entitled to impartial jury

§ 805.08(1)
St v Faucher
227 Wis. 2d 700, 715
(1999)

1) To be impartial, a juror must be indifferent and capable of basing verdict on the evidence

St v Gutierrez
2020 WI 52, ¶ 39
391 Wis. 2d 799
St v Funk
2011 WI 62, ¶ 31
335 Wis. 2d 369

2) Prospective jurors are presumed to be impartial; Def bears burden of rebutting this presumption and proving bias

St v Faucher
227 Wis. 2d 700, 716
(1999)

B. Grounds for excluding prospective jurors

1) Statutory disqualification

2) Subjective bias

3) Objective bias

§ 756.02
§ 805.08(1)

C. Statutory qualifications for prospective jurors

1) Resident of the Cty

2) At least 18 years of age

3) U.S. citizen

St v Carlson
2003 WI 40, ¶ 2
261 Wis. 2d 97

4) Able to understand English

§ 304.078
St v Mendoza
227 Wis. 2d 838, 852
(1999)

5) If previously convicted of a felony, has had civil rights restored

6) Not related by blood, marriage, or adoption to any party or to any Atty appearing in the case

St v Gesch
167 Wis. 2d 660, 666–67
(1992)
St v Thomas
2021 WI App 55, ¶ 45
399 Wis. 2d 277
aff'd on other grounds
2023 WI 9, ¶ 6 n10
405 Wis. 2d 654

Case law suggests that a relation must be to a third degree or less (as specified in § 990.001(16)) to be per se disqualification

7) No financial interest in the case

§ 756.28(1), (2)

8) Not summoned as a juror within the previous 4 years, unless judges in the circuit have established a specified time period between 2 and 4 years

D. Subjective bias

St v Faucher
227 Wis. 2d 700, 717
(1999)

1) Do the words or demeanor of the prospective juror reveal any opinion or bias that would prevent the juror from deciding the case on the evidence?

E. Objective bias

St v Faucher
227 Wis. 2d 700, 718
(1999)

1) Could a reasonable person in the prospective juror's position be impartial?

St v Smith
2006 WI 74, ¶ 25
291 Wis. 2d 569

2) "Important consideration" is whether juror believes he or she can be impartial

St v Smith
2006 WI 74, ¶ 31
291 Wis. 2d 569

3) Few bright-line rules about whether a person is objectively biased

St v Gesch
167 Wis. 2d 660, 666–67
(1992)

a. Relative to a third degree or less (e.g., sibling) of witness must be excluded

St v Tody
2009 WI 31, ¶ 38
316 Wis. 2d 689
St v Sellhausen
2012 WI 5, ¶ 29
338 Wis. 2d 286

b. Relatives and in-laws of judge should be excluded, *sua sponte*

4) Examples of prospective jurors who are not necessarily objectively biased

St v Louis
156 Wis. 2d 470, 479–80
(1990)

a. Police officers

St v Smith
2006 WI 74, ¶ 40
291 Wis. 2d 569

b. Employee of DA's office

F. Rehabilitating a biased juror

Patton v Yount
104 S. Ct. 2885, 2891
(1984)
Griffin v Bell
694 F3d 817, 823–24
(7th Cir 2012)
St v Lepsch
2017 WI 27, ¶ 36
374 Wis. 2d 98

1) Ct may find that juror who initially expresses bias will be impartial if juror is sincerely willing to set aside opinion and decide case on the evidence

St v Lepsch
2017 WI 27, ¶ 36
374 Wis. 2d 98

2) No magic words required to demonstrate willingness to set aside initial bias

St v Gutierrez
2020 WI 52, ¶ 41
391 Wis. 2d 799
St v Oswald
2000 WI App 3, ¶ 6
232 Wis. 2d 103

a. Juror need not state unequivocally or definitely that bias can be set aside; Ct must determine whether juror sincerely intends to put aside bias

St v Ferron
219 Wis. 2d 481, 503

(1998)

3) Ct must refrain from "badgering" juror to set aside bias

G. Ruling on challenge

1) Challenge

St v Brunette
220 Wis. 2d 431
(Ct. App. 1998)
St v Jones
218 Wis. 2d 599
(Ct. App. 1998)

a. Must be made before jury sworn

- Decision is one of strategy for Def's Atty, and

St v Erickson
227 Wis. 2d 758 (1999)

- Failure operates as waiver of error unless Atty is ineffective counsel

- Ct may in its discretion and for good cause allow challenge after jury sworn

b. Particular grounds must be stated, unless obvious and sufficiently disclosed

c. Denials of proposed questions or objections to jurors should be put on record

St v Wyss
124 Wis. 2d 681 (1985)

2) Waiver

McGeever v St
239 Wis. 87 (1941)
Osmundson v Lang
233 Wis. 591 (1940)
Brown v
La Crosse City Gas
21 Wis. 51 (1866)

a. Failure to question disqualification constitutes waiver of all objections

b. Failure to promptly advise Ct of disqualification of juror coming to light during trial constitutes waiver

Ullman v St
124 Wis. 602 (1905)
Gatzow v Buening
106 Wis. 1 (1900)

c. Unsuccessful challenge to juror or improper exclusion of question waived by failure to object to jury as whole

Davey v Janesville
111 Wis. 628 (1901)

d. Signifying satisfaction with jury as constituted estops challenge on appeal of correctness of ruling

3) Ruling on challenge

a. Burden of proving existence of disqualification on challenging party

Hammill v St
89 Wis. 2d 404 (1979)

b. Ct has wide discretion to reject or discharge juror disqualified or incompetent to serve, on own motion

St v Kiernan
227 Wis. 2d 736 (1999)
St v Ferron
219 Wis. 2d 481 (1998)

- Prospective juror is presumed impartial. Trial Ct must strike juror on finding of statutory, subjective or objective bias

St v Erickson
227 Wis. 2d 758 (1999)

- State reasons on record

- Determination regarding sincerity of prospective juror with regard to ability to consider evidence fairly also within Ct's discretion

St v Ferron
219 Wis. 2d 481 (1998)

c. Ruling reversible only when juror's bias is manifest

St v Lindell
2001 WI 108
245 Wis. 2d 689

d. If Trial Ct has erroneously failed to strike juror for cause based on bias, Def must prove error has affected or impaired his/her substantial rights in order to obtain a new trial

- Trial Ct's failure to strike single biased juror for cause, later removed by peremptory challenge, does not impair Def's substantial rights

- But need to use multiple strikes or deliberate Ct error may cause reversal of conviction

St v Mendoza
227 Wis. 2d 838 (1999)

- Automatic reversal not required in a situation when Trial Ct has erroneously granted motion to strike juror for cause

— Public policy supports elimination of juror bias and judicial inefficiency

Georgia v McCollum
112 S. Ct. 2348 (1992)
US v Chapman

158 F2d 417
(10th Cir 1946)

e. Right to challenge goes to exclude, not to include specific juror

St v Coble
100 Wis. 2d 179 (1981)

f. Juror not to be disqualified for cause solely because of personal predilection not to serve

H. Upon successful challenge for cause

1) Excuse juror, and

2) Summon another member of panel to take place

Hernandez v New York
111 S. Ct. 1859 (1991)
Batson v Kentucky
106 S. Ct. 1712 (1986)

7. Purposeful Discrimination Against Jurors

St v Jones
218 Wis. 2d 599
(Ct. App. 1998)

A. *Batson* challenge must be raised before jurors are sworn or issue is waived

Recommendation

Do not release jury panel until *Batson* challenges have been resolved

St v Lopez
173 Wis. 2d 724
(Ct. App. 1993)

B. Def denied equal protection when members of distinctive group purposefully excluded

JEB v Alabama ex rel TB
114 S. Ct. 1419 (1994)
Powers v Ohio
111 S. Ct. 1364 (1991)
St v Joe C (Paternity of Codey MR)
186 Wis. 2d 580
(Ct. App. 1994)

1) Def and excluded juror need not share same race or gender

2) State's discriminatory use of peremptory challenges harms excluded jurors by depriving them of opportunity to participate in civil life

3) Individual juror has right not to be excluded from petit jury because of race or gender

St v Davidson
166 Wis. 2d 35
(Ct. App. 1991)

a. However, kinship to a person who has been criminally charged or convicted may constitute legitimately racially-neutral reason for striking venireperson

Powers v Ohio
111 S. Ct. 1364 (1991)

4) Def has standing to raise third-party equal protection claims of jurors excluded by prosecution because of race or gender

Oliver v Heritage Mut Ins
179 Wis. 2d 1
(Ct. App. 1993)

5) Caution: Purposeful inclusion improper

St v Guerra-Reyna
201 Wis. 2d 751
(Ct. App. 1996)

C. Peremptory challenges cannot be exercised by State to remove jurors from distinctive group on assumption that members of that group unable to impartially consider State's case or even in good-faith belief that group would be prejudiced against Def

D. To establish prima facie case of purposeful discrimination Def must show

1) State used peremptory challenges to remove jury members of distinctive group

a. Can rely on fact that peremptory challenges constitute practice that permits those to discriminate who are of a mind to discriminate

b. Facts and relevant circumstances raise inference that peremptory challenges used to exclude members of distinctive group

St v Walker
154 Wis. 2d 158 (1990)

E. Burden shifts to State to articulate neutral explanation for peremptory challenge

1) Mere denial of discriminatory intent not sufficient

St v Gregory
2001 WI App 107
244 Wis. 2d 65
St v Jagodinsky
209 Wis. 2d 577
(Ct. App. 1997)

2) Explanation must be clear and reasonably specific, demonstrating a nexus between the legitimate factors for strike and the juror who was struck

3) Must not be pretextual

4) Explanation need not rise to level justifying exercise of challenge for cause

St v King
215 Wis. 2d 295
(Ct. App. 1997)

5) If explanation for challenge is in part based on a discriminatory reason, it is a violation of Equal Protection Clause

Hernandez v New York
111 S. Ct. 1859 (1991)

F. Ct must determine under totality of circumstances whether Def carried burden of proving purposeful discrimination

Flowers v Mississippi
139 S. Ct. 2228, 2243
(2019)

1) Ct may consider the following factors:

a. Statistical evidence about prosecutor's use of peremptory challenges against prospective jurors of distinctive group as compared with non-distinctive group

b. Evidence of prosecutor's disparate questioning and investigation of prospective jurors of distinctive group as compared with non-distinctive group

c. Side-by-side comparisons of prospective jurors of a distinctive group who were struck and prospective jurors of non-distinctive group who were not struck

d. Prosecutor's misrepresentation of juror's statement when defending challenges during *Batson* hearing

e. Relevant history of State's peremptory challenges in past cases

f. Other relevant circumstances that bear upon issue of discrimination

St v Walker
154 Wis. 2d 158 (1990)

G. Remedy if purposeful discrimination found

1) Discharge venire and select new jury from different panel not previously associated with case

2) Disallow discriminatory challenge and resume selection with improperly challenged juror reinstated

Recommendation

a. Do not reinstate juror if juror aware of challenge by prosecutor, because of substantial likelihood of bias against prosecutor

§ 972.03
§ 805.08(3)

8. Peremptory Challenges

A. Retain more than 12 jurors to sufficiently cover total number of peremptory challenges available to all parties

St v Erickson
227 Wis. 2d 758 (1999)
St v Oswald
2000 WI App 2
232 Wis. 2d 62

1) Including additional jurors, if any

a. Each side given 1 challenge if additional jurors are empaneled

§ 972.03

B. Number of challenges

1) Single Def case

St v Erickson
227 Wis. 2d 758 (1999)

a. First-degree murder and felony carrying possible life imprisonment penalty

- 6 to each side

b. All other felonies

- 4 to each side

c. All misdemeanors

- 3 to each side

2) Multiple Def case

a. First-degree murder and felony carrying possible life imprisonment penalty

- 12, if 2 Defs
- 18, if more than 2 Defs

b. All other felonies

- 6, if 2 Defs

- 9, if more than 2 Defs

c. All misdemeanors

- 4, if 2 Defs
- 6, if more than 2 Defs

d. Adverse defenses give Ct discretion to grant additional peremptory challenges to defense

St v Lepsch
2017 WI 27, ¶ 57
374 Wis. 2d 98

3) Unobjected error in awarding correct number of peremptory strikes is not presumptively prejudicial

§ 972.04(1)

C. Order of exercise of peremptory challenges

1) Usual practice

a. State goes first

b. Alternating strikes by each side

- Note: Statute ambiguous whether State must complete all its challenges first

2) Civil practice

§ 805.08(3)

a. Civil rules expressly provide for alternating strikes

D. Waiver of peremptory challenges

§ 972.04(1)

1) If party declines to exercise peremptory challenges, clerk exercises such challenges by lot

§ 972.04(2)

2) If party waives any or all peremptory challenges in advance of empaneling jury panel, number of jurors empaneled reduced accordingly

St v Nantelle
2000 WI App 110
235 Wis. 2d 91

E. Mistake in peremptory strike

1) Relief not mandated when mistake discovered after jurors chosen but before jury sworn in

Recommendation

2) Ask Attys to acknowledge this is jury they selected before swearing jury in

§ 972.04(1)

9. Additional Jurors

A. Procedure

§ 805.08(2), (3)
St v Oswald
2000 WI App 2
232 Wis. 2d 62

1) Each side given 1 challenge if additional jurors are empaneled

§ 972.03

2) Call panel with total equal to 12 jurors plus additional jurors to be seated plus total peremptory challenges allowed, including extra needed for additional jurors

3) Each side to strike until 12 jurors plus additional jurors remain

§ 972.10(7)

4) At close of arguments and instructions, select, by lot, jurors to be excused

St v Ledger
175 Wis. 2d 116
(Ct. App. 1993)

a. Additional jurors may deliberate and vote with consent of parties

St v Lehman
108 Wis. 2d 291 (1982)

b. Reversible error to substitute alternate for another juror after deliberations have begun

CR 24: JURY MANAGEMENT

1. Swearing in Jury

§ 756.08

A. Oath or affirmation must be administered to jurors selected to try case

"Do you and each of you swear (or affirm) that you will well and truly try the issue joined between _____, plaintiff, and _____, defendant, and, unless discharged by the Court, a true verdict give, according to law and the evidence given in Court, so help you God?"

St v Block
170 Wis. 2d 676
(Ct. App. 1992)

B. Swearing jury after testimony begins, but before deliberations is harmless error; does not warrant reversal unless Def shows prejudice

2. Jury Sequestration

§ 972.12

A. No mandatory sequestration

1) Discretionary in all cases

2) May be ordered at any time before submission of case to jury

§ 972.12

B. Discretionary sequestration once jury retires to deliberate on verdict

3. Postsentencing Questions About Juror Qualifications

St v King
120 Wis. 2d 285
(Ct. App. 1984)

A. Discovery during trial that juror knows or is acquainted with witness or Def

1) Ct and Atty voir dire juror to establish possible partiality

2) Ct must make record of results of voir dire

St v Alexander
2013 WI 70
349 Wis. 2d 327

3) Ct may exclude Def from in-chambers meeting if Def's Atty is present and Def's presence would not have contributed to the Ct's inquiry and might even have been counterproductive

St v Wyss
124 Wis. 2d 681 (1985)

B. False and misleading answers

St v Olson
179 Wis. 2d 715
(Ct. App. 1993)

1) Two-part burden on objecting party to establish that juror biased against party

a. Juror incorrectly or incompletely responded to material question, and

St v Faucher
227 Wis. 2d 700 (1999)
St v Delgado
223 Wis. 2d 270 (1999)

b. More probable than not that under facts and circumstances surrounding particular case, juror was biased against moving party

St v Williams
220 Wis. 2d 458
(Ct. App. 1998)

c. Specific proof of bias not required

St v Faucher
227 Wis. 2d 700 (1999)

2) Ct must consider following factors in determining bias

a. Did question asked sufficiently inquire into subject matter to be disclosed by juror?

b. Were responses of other jurors to same question sufficient to put reasonable person on notice that answer was required?

c. Did juror become aware of the false or misleading answers at any time during trial and fail to notify Ct?

St v Hampton
217 Wis. 2d 614
(Ct. App. 1998)
St v Hampton
201 Wis. 2d 662
(Ct. App. 1996)

4. Juror Conduct

A. Ct has important role to scrutinize attentiveness and condition of jurors

St v Saunders
2011 WI App 156, ¶ 32
338 Wis. 2d 160

1) Sleeping juror: Duty of party/Atty to bring to Ct's attention as soon as practicable

St v Novy
2013 WI 23
346 Wis. 2d 289

2) Allegation of juror inattentiveness requires twofold inquiry:

- Question of fact: Was juror inattentive to the point of potentially undermining fairness of trial?
- Question of law: Did Def suffer prejudice as result of juror's inattentiveness?

B. Any of following requires individualized voir dire initiated by Judge

1) Sleep by juror

2) Illness or hearing problem

3) Knowledge of witness not previously disclosed

4) Contact with parties, witnesses, or Attys

St v Faucher
227 Wis. 2d 700 (1999)
St v Williams
220 Wis. 2d 458
(Ct. App. 1998)

C. Serious bias or problem may require discharge of juror or mistrial

5. Jury View

§ 972.06
St v Nutley
24 Wis. 2d 527 (1964)

A. Addressed to sound discretion of Ct

1) Can demonstrative evidence achieve same end?

a. Use of photographs, maps, mock-ups, etc.

2) Do time and effort invested outweigh utility?

B. Purpose

1) Not to obtain new evidence

St v Coulthard
171 Wis. 2d 573
(Ct. App. 1992)

2) To enable jury to better understand evidence to be presented

St v Marshall
92 Wis. 2d 101 (1979)
St v Herrington
41 Wis. 2d 757 (1969)
Wis JI-Cr 152

C. Procedure

1) Hearing, before view, outside presence of jury, desirable to allow Attys to alert Ct to those matters at scene which should be brought to attention of jury

a. Motion must state, with particularity, area to be seen, with course of travel by map and text

b. Motion must include proposed text to be used by Ct for juror's benefit

Wis JI-Cr 152

2) Instruct jury that view not evidence

3) Premises viewed should be in condition akin to that which existed at time of event under inquiry

a. If not feasible, differences should be noted to jury

4) At scene, Attys not to talk with jury, but may ask Ct to point out certain things

5) Juror's questions at scene

a. Should be discouraged

b. If permitted, should be reduced to writing

6) Must be conducted on record

Amer Fam Mut Ins Co v Shannon
120 Wis. 2d 560 (1984)

a. Error to base findings on unconsented view of scene

6. Note-Taking by Jurors

§ 972.10(1)(a)1.
Wis JI-Cr 55

A. If authorized by Ct

1) Jurors may make written notes of all proceedings, except opening statements and closing arguments

2) Ct to provide materials for note-taking, if jurors request

3) Inform jurors that notes are confidential

4) Jurors may refer to own notes during proceedings and deliberations

5) Notes may not be basis for or object of any motion by a party

6) Notes to be promptly collected and destroyed after verdict rendered

§ 972.10(1)(a)2.

B. If not authorized by Ct

1) State reasons for determination on record

7. Jurors' Questions

Sommers v Friedman
172 Wis. 2d 459
(Ct. App. 1992)

A. Within discretion of Trial Ct to determine whether jurors will be allowed to submit questions for witnesses

B. Most Cts considering question of allowing jurors to submit questions for witnesses have generally confirmed propriety of jury questioning

St v Darcy NK
218 Wis. 2d 640
(Ct. App. 1998)
Wis JI-Cr 57

C. Jurors should submit questions in writing to Ct

8. Jury Deliberations

A. Sequestration

§ 972.12

1) Sequestration upon deliberation discretionary in all cases

St v Koller
2001 WI App 253
248 Wis. 2d 259

2) Judge may not communicate with jury ex parte, even on collateral matters, without knowledge and consent of parties

B. Discretionary with Ct which exhibits delivered to jury room

St v Anderson
2006 WI 77
291 Wis. 2d 673

1) Trial Ct must consider following 3 factors when exercising its discretion

a. Whether exhibit will aid jury in proper consideration of case

b. Whether party will be unduly prejudiced by submission of exhibit, and

c. Whether exhibit could be subjected to improper use by jury

Recommendation

2) Other factors Ct may consider

a. Prominence of exhibit in case

b. Inflammatory aspects of exhibit

c. Confusing aspects of exhibit

d. Undue highlighting of one aspect of case or testimony

St v Jensen
147 Wis. 2d 240 (1988)

- Treat Def's confession like other exhibits

- Within Ct's discretion to determine whether written confession to be sent to jury

Recommendation

3) Resolve at jury conference

C. Role of bailiff

§ 972.12

1) May be appointed by Ct to keep jury together and to prevent communication between jurors and others during deliberations or as directed by Ct

§ 756.08(2)

2) Must be given oath or affirmation

3) Conduit between Ct and jury

4) Not to answer any questions of law or fact relative to case

§ 972.12

5) Special duties if Ct orders jury sequestered from time jurors are sworn

a. Keep jury together at all times

b. Prevent communication at all times between jurors and others

c. Serve as conduit between Ct and jury throughout entire trial

d. Tend to juror's needs and comfort at motel or hotel facility used to house jury

e. Screen and censor all reading material and electronic media available to jury

f. Monitor any permitted communications between juror and third parties (e.g., members of juror's family)

g. Responsible for custody and control of jury while Ct not in session

D. Questions from jury

1) Answered on record by Ct and not off record through bailiff

St v Booth
147 Wis. 2d 208
(Ct. App. 1988)

a. Ct has duty to respond to inquiry with sufficient specificity to clarify jury's problem

St v Crowley
143 Wis. 2d 324 (1988)

b. If juror's communication is statement, not question, Trial Judge not required to respond with own statement

Kohlhoff v St
85 Wis. 2d 148 (1978)
St v McMahon
186 Wis. 2d 68
(Ct. App. 1994)

2) Before Ct's response, parties must be given opportunity to be heard regarding appropriate response

a. Conference must be on record and in open Ct

St v Alexander
2013 WI 70
349 Wis. 2d 327

b. Def or Def's Atty must be present

E. Rereading testimony/replaying recording

St v Anderson
2006 WI 77
291 Wis. 2d 673

1) Subject to Ct's discretion

2) Must be done in open Ct with Def and counsel present

3) If the victim's testimony is reread or replayed, Ct should reread or replay Def's testimony upon jury's request in open Ct

9. Hung Jury

Kelley v St
51 Wis. 2d 641 (1971)
Wis JI-Cr 520

A. Standard jury instruction does not have "coercive" impact of "*Allen* charge"

Madison v St
61 Wis. 2d 333 (1973)

1) Jury may be told that case will have to be retried if verdict not reached

Ziegler v St
65 Wis. 2d 703 (1974)

2) Jury may not be advised of expense involved in present trial and expected costs of new trial

St v Echols
175 Wis. 2d 653 (1993)

3) Jury should not be coerced into agreement by time deadlines

B. Factors in declaring a jury deadlock

1) Probability of agreement and length of deliberation

2) Importance of case

3) Expense of retrial

4) Possibility jury may agree on some counts

Wheeler v St
87 Wis. 2d 626 (1979)

5) Double jeopardy considerations: If Def does not consent to mistrial, retrial may be barred, unless manifest necessity for new trial

St v McMahon
186 Wis. 2d 68
(Ct. App. 1994)

C. Judge may not ask numerical division

10. Discharge of Jurors

§ 972.10(7)

A. Alternate juror discharged by lot

1) See **Selection of Jury**, **CR 23, Sec. 9** (**Additional Jurors**) for discharge for cause or incapacitation

B. Juror may be discharged for cause or incapacitation after trial begins

St v Gonzalez
2008 WI App 142
314 Wis. 2d 129
St v Williams
220 Wis. 2d 458
(Ct. App. 1998)

1) During evidentiary phase of trial

St v Spencer
2022 WI 56
403 Wis. 2d 86

2) After evidentiary phase, but before deliberations

St v Lehman
108 Wis. 2d 291 (1982)

3) After deliberations have begun

St v Lehman
108 Wis. 2d 291 (1982)

C. Procedure

1) Complete record needed to establish basis of exercise of discretion

2) State, Def, and Atty must be present and given chance to be heard

3) Detailed description necessary of how Ct became aware of juror's incapacitation or evidence justifying discharge for cause

4) Juror should be questioned

5) All argument by counsel and Ct's decision must be outside presence of jury

St v Spencer
2022 WI 56, ¶ 36 n13
403 Wis. 2d 86

6) Best practice is to avoid ex parte communications with jurors

However, ex parte communication with sick juror not erroneous when decision to dismiss juror before deliberations is on record with counsel

St v Lehman
108 Wis. 2d 291 (1982)

D. Extreme caution must be used to avoid mistrial by either

1) Needlessly discharging juror, or

2) In some manner prejudicing juror

St v Lehman
108 Wis. 2d 291 (1982)

E. Options available after discharge of juror

§ 972.02(2)

1) Obtain stipulation from the parties to substitute juror

2) Obtain stipulation to proceed with fewer than 12 jurors

a. See **Jury Waiver**, **CR 22**

3) Declare mistrial

a. See **Mistrial**, **CR 35**

CR 25: PRELIMINARY INSTRUCTIONS/ OPENING STATEMENTS

PRELIMINARY INSTRUCTIONS

1. Procedure

§ 972.10(1)(b)

A. Determine whether preliminary instructions to be given (not mandatory)

B. Furnish to parties before giving, so parties may object or propose other instructions

C. Give before opening statements

2. Standard Preliminary Instructions

Wis JI-Cr 50
See also Wis JI-Civ 50

A. Pattern preliminary instruction—includes

1) Wis JI-Cr 50—Jurors' Conduct

2) Wis JI-Cr 103—Evidence

3) Wis JI-Cr 58—Transcripts not available

4) Wis JI-Cr 300—Credibility

5) Substantive Instructions on elements

6) Wis JI-Cr 101—Opening Statements

7) Lists the following as optional

a. Wis JI-Cr 140—Burden of Proof

b. Wis JI-Cr 148—Objections

c. Wis JI-Cr 55 or 56—Note-taking

d. Wis JI-Cr 57—Jurors' Questions

3. Common Preliminary Instructions

Wis JI-Cr 157

A. Statements and remarks of Attys

Wis JI-Cr 160

B. Arguments of Attys

C. Theory of defense

St v Minued
141 Wis. 2d 325 (1987)
St v Herriges
155 Wis. 2d 297
(Ct. App. 1990)

1) Def has right to submit valid theory of defense instruction only where supported by evidence and timely request made

St v Peck
143 Wis. 2d 624
(Ct. App. 1988)

2) Theory of defense instruction valid only when correctly states a defense in fact or law, which defense is applicable to crime charged

St v Amos
153 Wis. 2d 257
(Ct. App. 1989)

a. Defense not entitled to instruction that merely highlights evidentiary factors

Wis JI-Cr 190

D. Weight of evidence

Wis JI-Cr 195

E. Juror's knowledge

OPENING STATEMENTS

1. Manner and Purpose

SCR 71.01

A. Must be on the record

Beavers v St
63 Wis. 2d 597, 606
(1974)
23A CJS *Criminal Procedure and Rights of Accused* § 1731 (2016)

B. Provide framework so jury can better understand and evaluate evidence

C. Allow Attys to outline facts of case expected to be proved and to clarify and narrow issues

2. Scope

Beavers v St
63 Wis. 2d 597, 606
(1974)

A. Scope and extent of opening statement within Ct's discretion

1) Statement should be brief and general, rather than detailed

2) Argument, inferences, and opinions not permitted

3) Comments should be confined to statements based on facts that can be proved

Beavers v St
63 Wis. 2d 597, 606
(1974)
St v Albright
98 Wis. 2d 663, 675
(Ct. App. 1980)

a. Comments may not include plainly inadmissible facts

Beavers v St
63 Wis. 2d 597, 606
(1974)

b. Comments may not include facts Atty not permitted to prove

c. Comments may not include facts Atty in good faith does not expect to prove

Beavers v St
63 Wis. 2d 597, 606
(1974)

B. Use of demonstrative evidence within discretion of Ct

St v Johnson
121 Wis. 2d 237
(Ct. App. 1984)

C. Def delivers opening statement

1) Prosecutor may comment on distinction between evidence and argument

2) Prosecutor cannot comment on Def's failure to testify

3. Interruption of Opening Statements and Curative Instructions

St v
Waste Mgmt of Wis, Inc
81 Wis. 2d 555, 573
(1978)

A. Matter of discretion for Ct with or without an objection

CR 26: WITNESSES

See **CR 27** for Expert Witnesses

1. Oaths

§ 906.03(1), (2)

A. Witnesses required to declare that they will testify truthfully by oath or affirmation

1) Administered in form substantially in conformity with statutory language

2) "Do you solemnly swear that the testimony you shall give in this matter shall be the truth, the whole truth and nothing but the truth, so help you God?"

§ 906.03(3)

B. If witness has conscientious scruples against taking oath or against swearing in usual form

1) Shall state a "solemn declaration or affirmation" that will testify truthfully

2) "Do you solemnly, sincerely, and truly declare and affirm that the testimony you shall give in this matter shall be the truth, the whole truth and nothing but the truth; and this you do under the pains and penalties of perjury?"

Comment

C. May consider combining oath and affirmation, i.e., "Do you solemnly swear or affirm…?"

Kellner v Christian
197 Wis. 2d 183 (1995)

D. Purpose of oath not to exclude any competent witness, but rather to add a stimulus to truthfulness whenever possible

E. Child witness

St v Gilbert
109 Wis. 2d 501 (1982)

1) Children competent to testify

St v Hanson
149 Wis. 2d 474, 482
(1989)

a. Under § 906.01, competency no longer test for admission of a witness's testimony

b. Only question is credibility

2. Competency of Witnesses

§ 906.01

A. Every person competent to be witness, unless

§ 906.01

1) Barred by particular rule

§ 906.06(1)

2) Included as member of jury, or

§ 906.05

3) Presiding at trial as Judge

B. For exceptions to general rule, see CR 32, Impeaching Jury Verdict

St v Dwyer
149 Wis. 2d 850 (1989)

C. Competency is issue of credibility to be weighed by trier of fact

§ 906.01

1) Wis Judges no longer empowered to review witness's competency

St v Hanna
163 Wis. 2d 193
(Ct. App. 1991)

2) Ct may not rule that witness unavailable because of incompetency

St v Dwyer
149 Wis. 2d 850 (1989)

a. However, witness whose testimony fails to relate to facts in issue, and is totally lacking in probative value, may be disqualified

US Const amend VI
Wis Const art I, § 7

3. Compulsory Process/Right to Present a Defense (See also CR 11)

Taylor v Illinois
108 S. Ct. 646 (1988)
St v Kirschbaum
195 Wis. 2d 11
(Ct. App. 1995)
St v Maday
179 Wis. 2d 346
(Ct. App. 1993)

A. Def has right to state's assistance in securing the raw materials for an effective defense, to compel attendance of favorable witnesses at trial, and to present evidence that might influence determination of guilt

St v Sorenson
152 Wis. 2d 471
(Ct. App. 1989)

1) Def does not have absolute right to subpoena witnesses or present testimony

2) State must show compelling state interest countervailing Def's right to subpoena victim

St v Gibas
184 Wis. 2d 355
(Ct. App. 1994)

3) State may violate 6th Amendment right to have compulsory process by arbitrarily preventing Def from presenting a witness's testimony, e.g., by intimidating defense witness

Green Bay Newspaper v Cir Ct
113 Wis. 2d 411 (1983)

B. Right to compulsory process intended to permit Def to request governmental assistance in obtaining exculpatory evidence

Green Bay Newspaper v Cir Ct
113 Wis. 2d 411 (1983)

C. Def must show reasonable probability that testimony of witness to be subpoenaed will lead to evidence that is

1) Competent

2) Relevant

3) Material, and

4) Exculpatory

Taylor v Illinois
108 S. Ct. 646 (1988)
St v Migliorino
170 Wis. 2d 576
(Ct. App. 1992)

D. Def has constitutional right to discover existence of potential witnesses

US v Nixon
94 S. Ct. 3090 (1974)
St v Migliorino
170 Wis. 2d 576, 587
(Ct. App. 1992)

1) An adjunct to maxim that the law is entitled to every person's evidence

2) Exceptions to demand for every person's evidence not lightly created or expansively construed

E. Right to present a defense

St v Morgan
195 Wis. 2d 388
(Ct. App. 1995)

1) Def has due process right to present a defense

   a. Right to a fair opportunity to defend against the State's accusations

2) Def has right to present evidence

   a. Rooted in Confrontation and Compulsory Process Clauses of US and Wis Constitutions

   b. Fundamental and essential to objective of achieving fair trial

St v Muckerheide
2007 WI 5
298 Wis. 2d 553

3) No right to present irrelevant evidence or evidence not offered for a proper purpose

St v Wilson
2015 WI 48
362 Wis. 2d 193
St v Denny
120 Wis. 2d 614
(1984)

4) Def has right to present evidence with a "legitimate tendency" to show that a third party committed a crime

St v Amos
153 Wis. 2d 257
(Ct. App. 1989)

5) Hearsay rule may not be mechanically employed to exclude testimony critical to defense that bears persuasive assurances of trustworthiness

St v St George
2002 WI 50
252 Wis. 2d 499
St v Pulizzano
155 Wis. 2d 633 (1990)

6) If proffered evidence is challenged, Def must make 5-part offer of proof to invoke constitutional right to present evidence

   a. Prior acts clearly occurred

   b. Acts closely resemble those of present case

   c. Prior act clearly relevant to material issue

   d. Evidence necessary to Def's case

   e. Probative value of proffered evidence outweighs prejudicial effect

   f. If all above established, Ct must determine whether State's interests in excluding evidence so compelling they overcome Def's right to present evidence

      - State's interest in promoting effective law enforcement alone not sufficient to overcome Def's right to present defense

      - State's interests to be closely examined and weighed against force of Def's right to present evidence as measured by above five factors

§ 907.02
St v St George
2002 WI 50
252 Wis. 2d 499

7) Expert testimony—Def must satisfy two-part inquiry to establish that exclusion violates right to present a defense

   a. First part—Def must show four factors:

      - Testimony met § 907.02 admissibility standards

      - Expert's testimony clearly relevant to material issue

      - Expert's testimony necessary to Def's case

      - Probative value outweighs prejudicial effect

   b. Second part—Ct must determine whether Def's right to present proffered evidence outweighed by State's compelling interests to exclude evidence

F. Def has right to seek suppression of certain evidence

St v Samuel
2002 WI 34
252 Wis. 2d 26

1) Def has right to challenge voluntariness of witness's prior statement to police

G. Prosecutor may introduce statement or confession of Def

St ex rel Goodchild
v Burke
27 Wis. 2d 244 (1965)

1) Provided *Goodchild* hearing requirements met

a. Hearing held before statement admitted

b. On record

Recommendation

c. Motion to suppress not required to trigger *Goodchild* hearing

2) Reversible error if Judge fails to conduct *Goodchild* hearing before Def's statement introduced

3) See **Suppression—Confessions, CR 21**

§ 906.15
Nyberg v St
75 Wis. 2d 400 (1977)

4. Exclusion of Witnesses from Hearing or Trial

A. Matter of right upon request

Fletcher v St
68 Wis. 2d 381 (1975)

B. Ct may order exclusion on own motion

C. Persons exempt from exclusion

Wis Const art. I, § 9m
(Marsy's Law)
§ 950.04(1v)(b)

1) Victim. But see § 906.15(2)(d) regarding exclusion to ensure fair trial

§ 906.15

2) Party who is natural person (e.g., Def)

§ 906.15

3) Officer or employee of party not natural person designated as its representative by its Atty

§ 906.15

4) Person whose presence shown to be essential to presentation of cause, such as

a. Investigator

b. Expert witness who will base own testimony on other evidence in case

St v Evans
2000 WI App 178
238 Wis. 2d 411

- Assertion of essential nature of expert's presence must be based on more than vague generalizations

Nyberg v St
75 Wis. 2d 400 (1977)
Loose v St
120 Wis. 115 (1903)

D. Sanction upon violation of order for exclusion

St v Wright
196 Wis. 2d 149
(Ct. App. 1995)

1) If witness is transgressor and person calling witness innocent of violation, appropriate sanction is contempt against witness

2) If person calling witness participated in violation, Ct may disqualify witness

a. Sufficient to disqualify witness if person had any foreseeable belief that s/he would call witness

St v Green
2002 WI 68
253 Wis. 2d 356
overruled in *part*
on other grds by
St v Johnson
2023 WI 39
407 Wis. 2d 195

3) If no prejudice results from violation

a. Not error to deny motion for mistrial

b. Not error to allow witness to testify

§ 906.15

E. Witnesses may be separated or sequestered during hearing or trial

1) Witness may be required to separate or isolate self from other witnesses and persons interested in trial

2) Sanctions and exemptions same as for exclusion

St v Copeland
2011 WI App 28

332 Wis. 2d 283

3) Ct may, as part of sequestration order, prohibit attorney from sharing testimony of prior witness with a nonparty witness who has not yet testified

5. Compelling Testimony—No 5th Amendment Privilege

§ 885.11(1), (2), (3)

A. Sanctions upon failure to respond to subpoena

1) Recovery of damages

2) Attachment of witnesses

3) Finding of contempt

a. Punishable by fine, and

b. Assessment of all costs related to apprehension of witness

§ 969.01(3)

B. Bail for witness may be required

1) If witness present

a. Must be material witness

b. Must be impractical to secure presence by subpoena

2) If witness not present

a. Must be material witness

b. Must be impractical to secure presence by subpoena

c. Warrant may issue

3) Upon failure to give bail, witness may be committed to custody of sheriff for up to 15 days to allow deposition to be taken

Peters v St
70 Wis. 2d 22 (1975)

C. Refusal to answer nonincriminatory question

St v Wedgeworth
100 Wis. 2d 514 (1981)

1) Ct may strike witness's direct testimony on following grounds

   a. Violative of right of confrontation, or

   b. Deprivation of meaningful cross-examination

Ch 785

2) Ct may summarily cite witness for contempt

St v Gonzalez
172 Wis. 2d 576
(Ct. App. 1992)

3) Ct may sanction under § 972.08(2)

6. Compelling Testimony—5th Amendment Privilege

§ 972.08(1)
Wis JI-Cr SM-55

A. General

1) Refusal to testify or to produce documentary evidence

St v McConnohie
121 Wis. 2d 57 (1984)

2) Witness and Ct apprehend danger that such testimony or evidence tends to incriminate witness or subject witness to forfeiture or harsher penalty

St v Marks
194 Wis. 2d 79 (1995)

3) Witness must have real and appreciable apprehension that testimony sought could be used against him/her in criminal proceeding

4) Privilege extends beyond sentencing stage

   a. While appeal is pending, or

   b. If witness expresses and Ct finds good-faith intention to pursue sentence modification, appeal, or withdraw plea

- Appeal: During time appeal may be taken as of right

St v Lee
88 Wis. 2d 239 (1979)

- Plea withdrawal: While Def has common-law right (1 year) to withdraw plea

- Sentence modification: if witness shows appreciable chance of success on the motion to modify

B. Procedure for compelling testimony—DA gives immunity

§ 972.08(1)

1) Witness must assert privilege against self-incrimination

St v Hall
65 Wis. 2d 18 (1974)

2) Ct must find that

   a. Testimony incriminatory, and

   b. Witness may properly claim privilege

3) Motion by DA to direct witness to answer

4) Ruling by Ct directing witness to answer

   a. Results in automatically vesting witness with immunity

   b. Does not bar prosecution for perjury or false swearing

5) Defense not entitled to request witness immunity

§ 972.08(2)

C. Refusal to answer following grant of immunity

1) Witness may be summarily confined until

   a. Willing to give testimony, or

   b. Until conclusion of trial, but

   c. Confinement cannot exceed one year

2) Witness may not be admitted to bail pending determination of appeal taken from order of confinement

§ 905.13

D. Asserting 5th Amendment privilege—no immunity

§ 905.13(2)

1) Attempt to prevent disclosure to jury of claim of privilege

a. Claim should be made outside presence of jury to extent practicable

St v Heft
185 Wis. 2d 288 (1994)

- Def not denied due process (right to present complete defense) or equal protection when Ct refuses to require witness to assert self-incrimination privilege in front of jury

- Def not denied due process (right to present complete defense) or equal protection when Ct refuses to instruct jury that it may draw inference from 5th Amendment invocation

§ 905.13(1)

b. Neither Judge nor counsel to comment on claim of privilege

§ 905.13(1), (3)

2) If jury learns of privilege claim, it may not draw inference therefrom, and should be so instructed, upon request

St v Nerison
136 Wis. 2d 37 (1987)

7. Plea Bargains and Testimony

A. State may properly offer immunity, lenient treatment, prosecutorial abstinence, or favor to person charged with crime, conditioned on person's full and truthful testimony

B. To be admissible, established safeguards must be followed

1) Full disclosure of plea bargain to jury

2) Opportunity for complete cross-examination

3) Adequate jury instructions

Wis JI-Cr 245

a. Testimony of accomplices

Wis JI-Cr 246

b. Testimony of witness granted immunity

Wis JI-Cr 305

c. *Falsus in Uno*, when appropriate

d. See **Jury Instructions**, **CR 30**

8. Confrontation

Crawford v Washington
124 S. Ct. 1354 (2004)

A. Ultimate goal of Confrontation Clause is to ensure reliability of evidence against criminal Def by testing in crucible of cross-examination

St v Jenkins
168 Wis. 2d 175
(Ct. App. 1992)

B. Criminal Def has same right to confront witnesses under Federal and State Constitutions

St v McCall
202 Wis. 2d 29 (1996)

1) Right not absolute

a. Testimony Def seeks to elicit must be relevant

b. Ct retains wide latitude to impose reasonable limits on cross-examination (to prevent harassment, confusion, prejudice, etc.)

Maryland v Craig
110 S. Ct. 3157 (1990)
St v Vogelsberg
2006 WI App 228
297 Wis. 2d 519

2) Barrier between Def and witness is not prohibited if Ct finds:

a. Procedure is necessary to protect welfare of child witness;

b. Child would be traumatized by presence of Def;

c. Potential distress to witness would be beyond mere nervousness

C. Analysis

Crawford v Washington
124 S. Ct. 1354 (2004)

1) Confrontation issue presented when *testimonial statement* of person absent from trial is offered. Admissible only if declarant unavailable and Def has had opportunity to cross-examine

St v Hanson
2019 WI 63
387 Wis. 2d 233

a. Testimonial statements allowed if not offered for truth of matter asserted

St v Zamzow
2017 WI 29, ¶ 24
374 Wis. 2d 220

b. Confrontation right applies at trial, not during pretrial proceedings, e.g., suppression motion hearings

c. Exceptions

Giles v California
128 S. Ct. 2678, 2682–83
(2008)
St v Beauchamp
2011 WI 27
333 Wis. 2d 1

- Dying declarations

Giles v California
128 S. Ct. 2678 (2008)

- Forfeiture by wrongdoing

d. Definition of testimonial statements "at a minimum" includes prior testimony at preliminary hearings, before grand jury, at former trial, or during police interrogations

Davis v Washington
126 S. Ct. 2266 (2006)

- Police interrogation

— Statements are testimonial when circumstances objectively indicate that there is no ongoing emergency and primary purpose of interrogation is to establish or prove past events relevant to later prosecution

See Michigan v Bryant
131 S. Ct. 1143 (2011)
US v Graham
47 F4th 561
(7th Cir 2022)
cert denied
143 S. Ct. 1770 (2023)

— Statements are nontestimonial when circumstances objectively indicate primary purpose of interrogation is to enable police to assist in ongoing emergency

St v Manuel
2005 WI 75
281 Wis. 2d 554
St v Savanh
2005 WI App 245
287 Wis. 2d 876

e. Definition of testimonial statements—3 formulations of core class:

- Ex parte in-Ct testimony or its functional equivalent, such as affidavits, custodial examinations, prior testimony when Def cross-examined, or similar pretrial statements that declarant would reasonably expect to be used prosecutorially;

- Extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; and

St v Doss
2008 WI 93
312 Wis. 2d 570

— Affidavits authenticating bank records are nontestimonial

- Statements made under circumstances that would lead an objective witness to reasonably believe that the statement would be available for use later at a trial

— Statements made between co-conspirators in the course of an undercover investigation are not testimonial

St v Rodriguez
2006 WI App 163
295 Wis. 2d 801
remanded (Wis 4/17/07)

— Out-of-court declaration is testimonial if overtly or covertly intended to implicate Def in Ct, rather than "stress-generated" to get help or secure safety and thus devoid of possible fabrication

St v Keller
2021 WI App 22
397 Wis. 2d 122

— Confidential reporter statement to social worker not testimonial

St v Ramirez
2023 WI App 63
410 Wis. 2d 224
pet for rev filed

— Statements made for the primary purpose of facilitating medical care were not testimonial

St v Jensen
2021 WI 27
396 Wis. 2d 196

— Statements by homicide victim to accuse Def in the event she died were testimonial

St v Hale
2005 WI 7
277 Wis. 2d 593

f. "Confrontation by proxy" (cross-examination at Co-Def's trial) will not satisfy Confrontation Clause

St v Stuart
2005 WI 47
279 Wis. 2d 659

g. Limited cross-examination at preliminary hearing is insufficient to satisfy Confrontation Clause

St v Morales-Pedrosa
2016 WI App 38, ¶¶ 31–41, 369 Wis. 2d 75

h. Prior testimonial statements admissible if declarant was subjected to full cross-examination at trial

St v Tomlinson
2002 WI 91
254 Wis. 2d 502
St v Marks
194 Wis. 2d 79 (1995)

2) If confrontation issue is presented, regarding nontestimonial, out-of-Ct statement admissible as either nonhearsay or under recognized hearsay exception, then

Ohio v Roberts
100 S. Ct. 2531 (1980)

St v Patino
177 Wis. 2d 348
(Ct. App. 1993)

a. Prosecution must establish unavailability of declarant, and

St v Jackson
187 Wis. 2d 431
(Ct. App. 1994)

b. Indicia of reliability of the hearsay statement (particularized guarantees of trustworthiness), OR statement "falls within a firmly rooted hearsay exception"

White v Illinois
112 S. Ct. 736 (1992)
St v Hickman
182 Wis. 2d 318
(Ct. App. 1994)

- A statement so trustworthy that adversarial testing can be expected to add little to its reliability

- Held "firmly rooted"

St v Patino
177 Wis. 2d 348
(Ct. App. 1993)

— Personal admissions by party opponent under § 908.01(4)(b)1.

St v Marshall
113 Wis. 2d 643 (1983)

— Adoptive admission under § 908.01(4)(b)2.

Bourjaily v US
107 S. Ct. 2775 (1987)
St v Ray
166 Wis. 2d 855
(Ct. App. 1992)

— Co-conspirator exception under § 908.01(4)(b)5.

White v Illinois
112 S. Ct. 736 (1992)
St v Martinez
150 Wis. 2d 62 (1989)

— Excited utterance exception under § 908.03(2)

St v Jackson
187 Wis. 2d 431
(Ct. App. 1994)

— Existing mental, emotional or physical condition (state-of-mind) exception under § 908.03(3)

St v Rundle
166 Wis. 2d 715
(Ct. App. 1992)

— Medical examination exception under § 908.03(4)

St v Jenkins
168 Wis. 2d 175
(Ct. App. 1992)

— Past-recollection-recorded exception under § 908.03(5)

St v Bauer
109 Wis. 2d 204 (1982)
St v Hickman
182 Wis. 2d 318
(Ct. App. 1994)

— Former testimony exception under § 908.045(1)

St v Denny
163 Wis. 2d 352
(Ct. App. 1991)
St v Buelow
122 Wis. 2d 465
(Ct. App. 1984)
cf St v Guerard
2004 WI 85
273 Wis. 2d 250

— Statement against penal or social interest under § 908.045(4). CAUTION: Is portion of statement implicating Def truly against *declarant's* interests?

St v Hickman
182 Wis. 2d 318
(Ct. App. 1994)

c. If declarant unavailable and statement either shown to be reliable or falls within a well-recognized exception, Ct must then examine case to determine whether unusual circumstances warrant exclusion

St v Petrovic
224 Wis. 2d 477
(Ct. App. 1999)

d. When statement is admissible under residual hearsay exception, Ct must look to showing of particularized guarantees of trustworthiness

St v Murillo
2001 WI App 11
240 Wis. 2d 666

- Social interest exception
- Residual hearsay exception not a firmly rooted exception for Confrontation Clause purposes
- Spontaneity, consistent repetition, mental state, terminology used, motive to fabricate, indicia of reliability shown through other factors

Bruton v US
88 S. Ct. 1620 (1968)
St v Mayhall
195 Wis. 2d 53
(Ct. App. 1995)

D. Co-defendant's confession

1) Confrontation Clause violated when nontestifying co-Def's confession incriminating another co-Def in the crime is introduced at their joint trial

St v Nieves
2017 WI 69, ¶ 35
376 Wis. 2d 300

a. *Bruton* applies only to statements that are testimonial; nontestimonial statements, such as statements made to jailhouse informants, are not barred

b. Limiting instruction does not cure violation

2) Confrontation Clause not violated if co-Def's confession is redacted to omit any reference to the Def's existence

Samia v United States
143 S. Ct. 2004 (2023)
Wis JI-Cr 221

a. If Def is nonetheless linked to co-Def's redacted confession by other properly admitted evidence, Ct must give limiting instruction

E. Forensic reports

Bullcoming v
New Mexico
131 S. Ct. 2705, 2716–17
(2011)

1) Reports created for use in prosecution or police investigation are testimonial, and therefore confrontation right applies

St v Thomas
2023 WI 9
405 Wis. 2d 654

2) Testimonial report (if not in evidence) on which expert relies is not admissible by State for truth of the matter asserted. (Defense may request a limiting instruction to this end.) Improper admission of report is reviewed under a harmless-error standard

St v Mattox
2017 WI 9, ¶ 3
373 Wis. 2d 122

NOTE: Crime lab reports are usually for evidentiary purposes and therefore testimonial.

St v Nelson
2021 WI App 2, ¶¶ 27–45
395 Wis. 2d 585

3) Nurse report from Child Advocacy Center written for treatment purposes not testimonial

F. Depositions

1) See **CR 11**

§ 908.08

9. Child's and Child-Victim's Statements

A. Audiovisual recordings of statements of children (not audiovisually recorded depositions)

St v Tarantino
157 Wis. 2d 199
(Ct. App. 1990)

1) Audiovisually recorded statements of children are additional exception to hearsay rule if taken pursuant to § 908.08

a. Statute incorporates opportunity for confrontation and is therefore constitutional

St v Williquette
180 Wis. 2d 589
(Ct. App. 1993)
aff'd on other grounds
190 Wis. 2d 677 (1995)

b. Purpose of statute is to permit evidentiary use of audiovisual recordings of children if safeguards are followed

St v Mercado
2021 WI 2
395 Wis. 2d 296

c. Findings must be made before ruling on admissibility, but Ct need not review entire recording

2) Requirements for admission

§ 908.08(3)(c)
St v Jimmie RR
2000 WI App 5
232 Wis. 2d 138

a. Statement made on oath or affirmation; if child's developmental level too limited, upon child's understanding that false statements punishable and of importance of telling truth

§ 908.08(3)(b)

b. Audiovisual recording must be accurate and free from excision, alteration, and distortion

§ 908.08(3)(a)

c. Child must be younger than 12

§ 908.08(4)

3) If child at least 12 but younger than 16, interest of justice must warrant admission of audiovisual recording, considering

a. Chronological age, level of development, and capacity to comprehend significance of events and to verbalize about them

b. Child's general physical and mental health

c. Whether events involved constituted criminal or antisocial conduct against child

d. Whether person involved was person with whom child has close emotional relationship

e. If conduct constituted battery or sexual assault, duration of assault and extent of physical or emotional injury caused thereby

f. Attitude of other household members to events and to underlying proceeding

g. Child's custodial situation

h. Child's familial or emotional relationship to those involved in proceeding

i. Child's behavior at and reaction to previous interviews regarding events

j. Whether child blames self for events or has been told by others not to disclose them

k. Whether child's prior reports to associates or authorities have been disbelieved or not acted upon

l. Child's subjective belief regarding consequences to self or person child emotionally close to

m. Any manifestations associated with post-traumatic stress disorder or other mental disorders

n. Whether admission of audiovisual recording would reduce mental or emotional strain of testifying or reduce number of times child needs to testify

§ 908.08(5)(a)

4) If audiovisually recorded statement admitted at other than prelim

a. Party offering statement may call child to testify immediately after statement shown to trier of fact; or

b. Upon request of any other party, Ct shall order child produced immediately for cross-examination

§ 908.01
St v Lomprey
173 Wis. 2d 209, 215
(Ct. App. 1992)

c. Child's videotaped nonverbal conduct may be "in-court testimony" if Ct finds such conduct intended as an assertion

d. Lack of cross-examination does not affect admissibility of child's testimonial conduct at trial

St v Marks
2022 WI App 20
402 Wis. 2d 285
pet for rev denied

e. Recording may be result of merging of video and audio as long as § 908.08 requirements met

§ 908.08(5)(b)

5) Judge may not order child to appear for cross-examination at prelim upon failure of party who offers audiovisually recorded statement to call child to testify

St v Ruiz-Velez
2008 WI App 169
314 Wis. 2d 724

6) Recording must be transcribed by official Ct reporter

§ 908.03(2)

B. Admissibility of child-victim's statements under excited utterance exception

St v Sorenson
143 Wis. 2d 226 (1988)
St v Gerald LC
194 Wis. 2d 548
(Ct. App. 1995)

1) Statement relating to a startling event or condition made while declarant was under the stress of excitement caused by the event or condition

St v Huntington
216 Wis. 2d 671 (1998)

2) Primary factors

a. Age of child

b. Contemporaneity, as measured by duration of the stress or nervous shock acting on declarant at the time of the statement

c. Spontaneity, i.e., opportunity and capacity to review the event and to calculate the effect of child's statements

d. To whom reported (usually to mother)

3) Rule is liberally applied in cases involving child-victim declarant

a. General psychological characteristics of children typically extend the period of time that is free from the dangers of conscious fabrication

b. Young children will tend to repress the stressful incident

§ 908.03(24), § 908.045(6)
St v Petrovic
224 Wis. 2d 477
(Ct. App. 1999)
St v Kevin LC
216 Wis. 2d 166
(Ct. App. 1997)

C. Admissibility of child-victim's statements under residual hearsay exception

1) Issue: Trustworthiness of the statement

St v Mercado
2021 WI 2
395 Wis. 2d 296
St v Sorenson
143 Wis. 2d 226 (1988)

2) Factors to consider: Totality of circumstances test

a. Attributes of child: Age, ability to communicate, to comprehend statements/questions of others; to know difference between truth/falsehood; any fear of punishment, retribution, or other personal interest, such as relationship with Def, which might affect motivation to tell truth

b. Person to whom statement made: Relationship to child and impact of relationship; any motivation of recipient to falsify or distort child's statement

c. Circumstances under which statement made: Relation to time of alleged assault; availability of person in whom child might confide; and other contextual facts enhancing or detracting from statement's trustworthiness

d. Content of statement: Signs of deceit or falsity; whether statement reveals knowledge of matters not ordinarily attributable to child of similar age

e. Other corroborating evidence: Physical evidence of assault; statements made to others; comparison of statement to opportunity and motive of Def

St v Gerald LC
194 Wis. 2d 548
(Ct. App. 1995)

3) No single factor dispositive—Ct must evaluate force of all factors

Idaho v Wright
110 S. Ct. 3139 (1990)
St v Lomprey
173 Wis. 2d 209
(Ct. App. 1992)

4) If confrontation right exists (e.g., at trial), evidence must possess indicia of reliability by virtue of inherent trustworthiness. May NOT take into account other evidence at trial that corroborates truth of hearsay statement

a. Confrontation Clause requires exclusion of out-of-court statement unless affirmative reason, arising from circumstances in which statement made, rebuts presumption that hearsay statement is not worthy of reliance at trial

b. Test: Whether child declarant was particularly likely to be telling truth when statement made

c. Factors: Spontaneity, consistent repetition, use of terminology unexpected of child of similar age, lack of motive to fabricate, and similar factors

§ 908.03(4)

D. Admissibility of statements under medical diagnosis or treatment exception

St v Huntington
216 Wis. 2d 671 (1998)

1) Statements made by child-victim's mother to nurse practitioner investigating alleged abuse, although double hearsay, are properly admitted as falling within the medical diagnosis or treatment exception

10. Use of Former Testimony

St v Wyss
124 Wis. 2d 681 (1985)

A. Two tests must be met to allow use of witness's former testimony

1) Witness must be unavailable

§ 908.04(1)(e)

a. Prosecution must make good-faith effort to obtain attendance at trial, or

St v Burns
112 Wis. 2d 131 (1983)

b. Witness dead or suffering from physical or mental illness or infirmity

2) Evidence must bear some indicia of reliability

11. Out-of-Court Translators

St v Patino
177 Wis. 2d 348
(Ct. App. 1993)

A. If no indication of inaccuracy, translator is considered a conduit for communication—translator's statements are those of the speakers—and thus translator need not be a witness

1) Statement made to translator does not create additional layer of hearsay

2) Rule applies to translations by parties and witnesses

3) The out-of-court, translated statements must be admissible under an exception to the hearsay rule

Recommendation
§ 901.04(3)(d)

B. Ct should conduct hearing out of presence of jury to determine whether opponent can show

1) Translator had motive to mislead or distort

2) Translation was inaccurate

12. Privileges

St v Joseph P
(Int of Joy P)
200 Wis. 2d 227
(Ct. App. 1996)

A. For privilege to apply, communication must be confidential

1) Holder's belief in communication's confidentiality must be "objectively reasonable"

2) That service provider shares communications for privileged purpose does not affect confidentiality

B. Selected privileges (*see* Ch 905)

§ 905.03

1) Atty-client

Journal/Sentinel, Inc v Sch Bd
186 Wis. 2d 443
(Ct. App. 1994)

a. Applies to confidential communications from client to lawyer, not vice versa, unless latter would reveal substance of client's confidential communication

Borgwardt v Redlin
196 Wis. 2d 342
(Ct. App. 1995)

b. Only client, as "holder" of privilege, or someone authorized by client, may waive

§ 905.03(4)(c)
St v Simpson
200 Wis. 2d 798
(Ct. App. 1996)

c. Privilege is absolute unless § 905.03(4) exception applies or voluntarily waived

St v Meeks
2003 WI 104
263 Wis. 2d 794

d. Party asserting privilege bears burden to establish that privilege applies

St v Boyd
2011 WI App 25, ¶ 21
331 Wis. 2d 697

e. Privilege is waived when Def claims he or she cannot effectively communicate with Atty

§ 905.04

2) Physician-patient privilege

a. A patient has a privilege to prevent a physician from testifying

b. Selected exceptions

§ 905.04(4)(c)
Winnebago Cty DSS v Harold W (Gdnship of Tina Marie W)
215 Wis. 2d 523
(Ct. App. 1997)

- When patient's physical, mental, or emotional condition is element of patient's defense, if limited in scope to nature of such defense

§ 905.04(4)(d)

- Homicide trials, when disclosure relates directly to circumstances of the homicide

§ 905.04(4)(f)

- Chemical tests for intoxication

§ 905.04(4)(a)
St v Post
197 Wis. 2d 279 (1995)
St v Zanelli
212 Wis. 2d 358
(Ct. App. 1997)

- Evidence regarding alleged sexually violent person's (sexual predator's) psychiatric condition offered in Ch 980 commitment or discharge hearing

§ 905.10

3) Confidential informant

a. *See* **CR 10, Sec. 4.D.**

§ 905.05

4) Spousal and domestic partnership privilege

§ 905.05(3)
St v Richard GB
2003 WI App 13
259 Wis. 2d 730

a. No privilege when one spouse is charged with crime against third person in course of committing crime against other spouse

St v Eison
2011 WI App 52, ¶¶ 23–34, 332 Wis. 2d 331

b. Spouses' recorded conversations from jail not a "private communication"; therefore, not privileged

§ 942.01(3)
St v Cardenas-Hernandez
219 Wis. 2d 516 (1998)

C. Statements made by Def at John Doe proceeding are absolutely privileged under § 942.01(3), even if perjurious

St v Migliorino
170 Wis. 2d 576
(Ct. App. 1992)

D. Cannot create testimonial privileges by judicial decision

St v McConnohie
121 Wis. 2d 57 (1984)
St v Whitaker
167 Wis. 2d 247
(Ct. App. 1992)

E. Potential witness's right against self-incrimination defeats Def's right to compulsory process

§ 905.11
St v Speese

191 Wis. 2d 205
(Ct. App. 1995)
rev'd on other grounds
199 Wis. 2d 597 (1996)

F. Privilege is waived if the holder voluntarily discloses or consents to disclosure of the confidential matter or communication or any significant part thereof

13. Rape Shield Statute: § 972.11

A. Prior sexual conduct

§ 972.11(2)(b)
St v Hammer
2000 WI 92
236 Wis. 2d 686
St v Jackson
216 Wis. 2d 646 (1998)

1) In sexual assault prosecution, evidence concerning complainant's prior sexual conduct (including absence of sexual activity) or reputation not admissible unless statutory or judicially created exception

St v Wirts
176 Wis. 2d 174
(Ct. App. 1993)

a. "Prior sexual conduct" means conduct before conclusion of trial, not before alleged crime

St v Mulhern
2022 WI 42
402 Wis. 2d 64
Michael RB v St
(In Int of Michael RB)
175 Wis. 2d 713 (1993)

b. Exclusion applies to evidence showing absence of sexual activity as well, even if offered to refute defense that vaginal DNA evidence belonged to another perpetrator

B. Exceptions—Statutory

§ 972.11(2)(b)1.

1) Complainant's past conduct with Def—to be admissible,

St v Sarfraz
2014 WI 78
356 Wis. 2d 460

a. Evidence must be material to a fact at issue, and

b. Evidence of the sexual contact must be of sufficient probative value to outweigh its prejudicial effect

§ 972.11(2)(b)2.

2) Specific instances of sexual conduct showing source or origin of semen, pregnancy, or disease to show

a. Degree of sexual assault

b. Extent of injury suffered

Michael RB v St
(In Int of Michael RB)
175 Wis. 2d 713 (1993)

- Enlarged hymenal opening not a disease

§ 972.11(2)(b)3.
St v Ringer
2010 WI 69, ¶¶ 30–31
326 Wis. 2d 351

3) Complainant's prior untruthful accusation of sexual assault

a. Def should make pretrial offer of proof

b. Def has burden to prove proffered evidence such that jury could reasonably find complainant made prior untruthful allegation

Michael RB v St
(In Int of Michael RB)
175 Wis. 2d 713 (1993)

4) Legislature's adoption of § 972.11(2)(c) mandates restricted interpretation of § 972.11(2)(b). Sec. 972.11(2)(c) "absolutely" prohibits Ct from expanding scope of statute's listed exceptions

a. Rule of § 901.06 that evidence inadmissible for one purpose may be admissible for another NOT applicable to rape shield statutory exclusions

St v Dunlap
2002 WI 19
250 Wis. 2d 466

C. Exceptions—Constitutional

St v Burns
2011 WI 22, ¶ 35,
332 Wis. 2d 730
St v Pulizzano
155 Wis. 2d 633 (1990)

1) To establish constitutional right to present evidence, offer of proof must meet five tests

a. Prior acts clearly occurred

b. Acts closely resembled those of present case

c. Prior act is clearly relevant to a material issue

d. Evidence is necessary to Def's case

e. Probative value of evidence outweighs its prejudicial effect

Michael RB v St
(In Int of Michael RB)
175 Wis. 2d 713 (1993)
St v Moats
156 Wis. 2d 74 (1990)
St v Pulizzano
155 Wis. 2d 633 (1990)

2) Right to present defense and cross-examine

St v Carter
2010 WI 40
324 Wis. 2d 640

a. Evidence of prior sexual assaults to establish alternative source for complainant's knowledge or injury

St v Dunlap
2002 WI 19
250 Wis. 2d 466
St v Gavigan
111 Wis. 2d 150 (1983)

b. Evidence of prior sexual conduct

St v Jagielski
161 Wis. 2d 67
(Ct. App. 1991)

- Evidence must serve to prove relevant fact independent of complainant's prior sexual conduct
- Probative value of evidence must outweigh prejudice caused by its relation to complainant's prior conduct
- If requested, Ct must give limiting instruction regarding purpose for which evidence was admitted

Recommendation

— Instruct jury that evidence CANNOT be considered as indicating complainant's prior sexual conduct

St v Pulizzano
155 Wis. 2d 633 (1990)

3) Confrontation

St v Herndon
145 Wis. 2d 91
(Ct. App. 1987)
overruled on other
grounds by
St v Pulizzano
155 Wis. 2d 633 (1990)

a. Evidence of complainant's motive to fabricate (limited)

St v Gulrud
140 Wis. 2d 721
(Ct. App. 1987)
as interpreted in
St v Wirts
176 Wis. 2d 174
(Ct. App. 1993)

b. Evidence of post-assault intercourse to show someone else caused the injury

c. Rebuttal of evidence produced by State to corroborate assault allegation

St v Pulizzano
155 Wis. 2d 633 (1990)

4) Compulsory process rights (limited)

a. *See* **Sec. 3, Compulsory Process/Right to Present a Defense**, above

D. Other exceptions

St v Vonesh
135 Wis. 2d 477
(Ct. App. 1986)

1) Future conduct or behavior

2) Writings about sexual desires or activities

St v Rognrud
156 Wis. 2d 783
(Ct. App. 1990)

3) Evidence that complainant falsely accused third party of assaulting another

Michael RB v St
(In Int of Michael RB)
175 Wis. 2d 713 (1993)

4) Third party's personal sexual experiences told to the victim

5) Expert evidence to show or rebut that victim's physical condition consistent with vaginal penetration

§ 972.11(2)(d)

E. Manner of dress

1) In sexual assault prosecution, evidence of complaining witness's manner of dress is admissible only if

a. Relevant to a contested issue, and

b. Probative value substantially outweighs the following

- Danger of unfair prejudice, confusion of the issues, or misleading the jury
- Considerations of undue delay, waste of time, or needless presentation of cumulative evidence

2) Ct must determine admissibility of "manner of dress" evidence upon pretrial motion

§ 972.11(2)(b)
St v Moats
156 Wis. 2d 74 (1990)

F. Pretrial determination of applicability of § 971.31(11) exception and admissibility required

1) In general

Michael RB v St
(In Int of Michael RB)
175 Wis. 2d 713 (1993)

a. Proponent of evidence must make offer of proof

b. Question-and-answer format preferred over offer of proof made in statement form

2) Statutory exceptions—Ct must determine

St v DeSantis
155 Wis. 2d 774 (1990)

a. Whether proffered evidence fits within statutory provisions

St v Ringer
2010 WI 69, ¶¶ 30–31
326 Wis. 2d 351

- Sec. 972.11(2)(b)3.; Ct must conclude that a reasonable person could reasonably find that complainant made a prior untruthful sexual assault allegation

b. Whether evidence material to fact at issue

c. Whether evidence of sufficient probative value to outweigh its inflammatory and prejudicial nature

St v Jagielski
161 Wis. 2d 67
(Ct. App. 1991)

3) Constitutional exceptions

St v Pulizzano
155 Wis. 2d 633 (1990)

a. If above criteria in **Sec. 13.C.**1) met, Judge determines whether compelling State interest requires exclusion

- State's interest in promoting effective law enforcement not sufficient to overcome Def's constitutional right to present evidence

- State's interest in its evidentiary rules does not overcome Def's right to present evidence and to effectively cross-examine

- State's interest not sufficient when there are other less restrictive alternatives available to protect those interests

St v Foy
206 Wis. 2d 629
(Ct. App. 1996)

14. Attorney as Witness

A. Attys are competent to testify

B. Trial Ct has discretion to allow advocate to testify in client's case

1) No general prohibition under rules of evidence against Atty testifying for client

2) Ct, however, should not usually permit Atty who is advocate in a trial to testify in that trial, especially when value of testimony is small or collateral to ultimate issues

SCR 20:3.7

a. Ethical prohibition against Atty testifying for client unless

- Testimony relates to uncontested issue
- Testimony relates to nature and value of legal services
- Disqualification of lawyer would work substantial hardship on client

b. Ethical prohibition is not absolute rule and Ct may permit Atty to testify when justice requires

- Ct should balance client's interest in continuing to be represented by same Atty against prejudice to opposing party if Atty acts in both roles
- Opposing party may be prejudiced if Ct does not assure that Atty-witness gives evidence and not an analysis of the evidence
- Ct may consider
  - — Nature and significance of proposed testimony
  - — Whether Atty knew ahead of time that the testimony would be necessary
  - — What caused the need for the testimony
  - — Whether opposing party opened the door to a matter to which it was clear opposing counsel was an eyewitness

c. Ct has option of permitting Atty to withdraw and declare mistrial, with substitute counsel representing client at new trial

3) If factors favor permitting Atty to testify, Ct must weigh them against the alternatives available

a. Proceed with trial and allow Atty to testify

- Consider the awkwardness and potential confusion to the jury, or

b. Grant mistrial so that new Atty may appear

- Consider delay and inconvenience of a continuance

- *See* **CR 35**, **Mistrial**

St v McDowell
2004 WI 70
272 Wis. 2d 488

15. Defendant Perjury

A. Counsel's role

1) Dissuade client

2) Seriously consider withdrawal

3) Permit Def's testimony in narrative, but only after informing Def, opposing counsel, and Ct

B. Ct's role

1) Shall be required to examine both counsel and Def and make record of following:

a. Basis for counsel's conclusion that Def intends to testify falsely;

b. Def's understanding of right to testify, notwithstanding the intent to testify falsely; and

c. Def's and counsel's understanding of nature and limitations of narrative questioning that will result

St v Sandoval
2009 WI App 61, ¶ 30
318 Wis. 2d 126

16. Rebuttal Witness

§ 971.23(1)(d)

A. No duty to disclose

1) No duty to disclose names or statements of rebuttal witnesses if they are bona fide rebuttal witnesses

2) Test of admissibility is whether it only became necessary and appropriate when opposing party presented his or her case-in-reply

St v Novy
2013 WI 23
346 Wis. 2d 289

B. Evidence ruled inadmissible in case-in-chief may be admissible for rebuttal

CR 27: EXPERT WITNESSES

1. Expert Witnesses

§ 907.02(1)

A. Witness qualified by

1) Knowledge,

2) Skill,

3) Experience,

4) Training, or

5) Education

§ 907.02
St v Kandutsch
2011 WI 78, ¶¶ 26–45
336 Wis. 2d 478
St v Shomberg
2006 WI 9, ¶ 10
288 Wis. 2d 1
St v St George
2002 WI 50, ¶ 37
252 Wis. 2d 499

B. Permitted if

St v Maday
2017 WI 28, ¶ 40

374 Wis. 2d 164

1) Expert testimony will assist trier of fact in understanding evidence, and

2) Expert testimony will assist in determining a fact in issue, and

St v Perkins
2004 WI App 213
277 Wis. 2d 243

3) Testimony deals with matters beyond realm of ordinary experience and knowledge of humankind

St v Hollingsworth
160 Wis. 2d 883
(Ct. App. 1991)

a. Question is does witness know something beyond that generally known in community

St v Watson
227 Wis. 2d 167 (1999)

b. The fact that a lay witness of ordinary intelligence may also understand subject matter does not require exclusion

St v St George
2002 WI 50, ¶¶ 53–55
252 Wis. 2d 499

4) Def establishes a constitutional right to admissibility of the evidence and satisfies a two-part test

a. Satisfies each of the following four factors:

- Expert testimony meets standard of § 907.02
- Expert testimony clearly relevant to a material issue
- Expert's testimony is necessary to the Def's case
- Probative value outweighs prejudice

St v Fischer
2008 WI App 152, ¶¶ 21–24, 314 Wis. 2d 324
aff'd, 2010 WI 6
322 Wis. 2d 265

b. Def's right to present evidence is not outweighed by State's compelling interest to exclude it

§ 907.02
Daubert v
Merrell Dow Pharm
113 S. Ct. 2786 (1993)
St v Alger
2015 WI 3, ¶ 4
360 Wis. 2d 193
St v Peters

192 Wis. 2d 674
(Ct. App. 1995)

C. Beginning with actions or special proceedings commenced on or after February 1, 2011, Wisconsin uses "reliability (*Daubert*) test"; pre-February 1, 2011, Wisconsin uses "relevancy test"

§ 907.02(1)
Daubert v
Merrell Dow Pharm
113 S. Ct. 2786 (1993)

1) Expert testimony admissible if

a. It is based on sufficient facts or data

b. It is the product of reliable principles and methods

c. Witness has applied the principles and methods reliably to the facts of the case

Kumho Tire Co
v Carmichael
119 S. Ct. 1167, 1174
(1999)
St v Jones
2018 WI 44, ¶ 32
381 Wis. 2d 284

2) Ct has discretion in fulfilling gatekeeping duties under *Daubert* to determine whether the proffered expert's scientific, technical, or other specialized knowledge makes a fact of consequence more probable or not, and, further, whether the evidence is reliable enough to go to the fact-finder

St v Cameron
2016 WI App 54, ¶ 13
370 Wis. 2d 661

a. If no objection, Trial Ct not required to sua sponte conduct a *Daubert* hearing

US v John
597 F3d 263, 274–75
(5th Cir 2010)
St v Schmidt
2016 WI App 45, ¶ 70
370 Wis. 2d 139

b. Ct may conduct pretrial hearing to determine admissibility, but if expert methodology is generally accepted and novel issues are not presented, *Daubert* hearing may not be necessary

St v Dobbs
2020 WI 64, ¶ 42
392 Wis. 2d 505

c. Experts can testify in form of an opinion "or otherwise," including exposition testimony on general principles without applying those principles to or having knowledge of the case facts

§ 907.02(1)
St v Jones
2018 WI 44, ¶¶ 29–30
381 Wis. 2d 284
St v Bucki
2020 WI App 43, ¶¶ 45–

46, 51, 393 Wis. 2d 434
(cadaver-scent dog)

d. Ct acting as gatekeeper shall apply these factors:

- Whether the scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue;
- Whether the expert is qualified as an expert by knowledge, skill, experience, training, or education;
- Whether the testimony is based on sufficient facts or data;

St v Hogan
2021 WI App 24, ¶ 25
397 Wis. 2d 171

- Whether the testimony is the product of reliable principles and methods; and
- Whether the witness has applied the principles and methods reliably to the facts of the case

Daubert v
Merrell Dow Pharm, Inc
113 S. Ct. 2786, 2796–97
(1993)

e. Ct also may apply these factors if scientific evidence is proffered:

- Whether a "theory or technique … can be (and has been) tested"
- Whether it "has been subjected to peer review and publication"
- Whether, in respect to a particular technique, there is a high "known or potential rate of error"
- Whether there are "standards controlling the technique's operation"
- Whether the theory or technique enjoys "general acceptance" within a "relevant scientific community"

St v Smith
2016 WI App 8, ¶ 9
366 Wis. 2d 613

f. Other factors may be determinative of reliability

Seifert v Balink
2017 WI 2
372 Wis. 2d 525

- If medical testimony is proffered, consider the factors discussed in *Seifert*

§ 907.03
St v Thomas
2023 WI 9
405 Wis. 2d 654

D. Basis of opinion

1) Firsthand observation made by expert (e.g., treating physician testifying regarding patient), or

2) Evidence presented at trial, or

3) Data presented to expert outside of trial

St v Swope
2008 WI App 175, ¶ 34
315 Wis. 2d 120

4) Underlying basis for opinion need not be admissible if of type reasonably relied on by experts in particular field

St v Harrell
2008 WI App 37, ¶¶ 22–24, 308 Wis. 2d 166

a. Exception if underlying basis is testimonial, compelled, and incriminating statement in violation of 5th Amendment

St v Thomas
2023 WI 9
405 Wis. 2d 654
See Williams v Illinois
132 S. Ct. 2221 (2012)
St v Deadwiller
2013 WI 75, ¶¶ 39–40
350 Wis. 2d 138

b. Out-of-court statements (in a lab report) related by an expert solely for the purpose of explaining the assumptions on which the expert's opinion rests are testimonial and fall within the scope of the Confrontation Clause

§ 907.03

5) Beginning with cases filed on or after February 1, 2011, facts or data otherwise inadmissible may not be disclosed to the jury by the proponent unless the Ct determines that their probative value substantially outweighs their prejudicial effect

6) Basis for independent opinion may be the work of others:

St v Griep
2015 WI 40, ¶ 57
361 Wis. 2d 657 (BAC)
St v Deadwiller
2013 WI 75, ¶¶ 39–40
350 Wis. 2d 138 (sexual assault DNA profile)
St v Williams
2002 WI 58, ¶ 20
253 Wis. 2d 99 (drug ID)

a. If witness supervised or reviewed work of others and is familiar with the procedures the others used

St v Mattox
2017 WI 9, ¶ 40
373 Wis. 2d 122 (autopsy toxicology report)

b. If obtained without law enforcement request

E. Soundness of opinion

Pucci v Rausch
51 Wis. 2d 513, 519
(1971)

1) Opinions must be stated to reasonable professional (medical, engineering, etc.) probability

Drexler v
All Am Life & Cas Co
72 Wis. 2d 420 (1976)

a. No particular words of art required: "I feel," "I believe," "likely," etc. may be sufficient

Drexler v
All Am Life & Cas Co
72 Wis. 2d 420 (1976)
Unruh v Ind Comm'n
8 Wis. 2d 394 (1959)

b. Test: Under reasonable interpretation of meaning or sense in which the words are used, is witness expressing an expert opinion

McGarrity v
Welch Plumbing Co
104 Wis. 2d 414, 430
(1981)

2) Mere possibility or conjecture insufficient

§ 907.05

F. Underlying data

1) Expert may testify as to opinion without prior disclosure of underlying facts or data, unless

a. Ct directs otherwise, or

Karl v
Employers Ins of Wausau
78 Wis. 2d 284 (1977)

b. Cross-examination inquires about underlying data

Rabata v Dohner
45 Wis. 2d 111 (1969)

2) Hypothetical question not required

Schulz v St Mary's Hosp
81 Wis. 2d 638 (1978)

3) If hypothetical question used

a. Must be based on assumptions that have support in evidence

b. If no basis for question exists in evidence, question and answer subject to motion to strike

§ 907.07

G. Use of reports at trial

1) Expert may read report personally made or jointly made with another to same extent as contents could be received as oral testimony from witness

2) Before use, copy must be provided to opposing party

H. Cross-examination of expert at trial

1) Within discretion of court as to character issues not directly related to expert opinion or underlying basis for opinion

St v Lindh
161 Wis. 2d 324 (1991)

2) Expert witness with ongoing "dual relationship" with prosecutors (e.g., on probation or acting under plea agreement while offering expert opinion testimony for State) may be cross-examined on nature of relationship

a. Possibility of bias, motive, and interest of expert witness is distinct and immediate in such circumstances

I. Payment of expert/investigator fees—Def eligible for SPD

Polk Cty v SPD
179 Wis. 2d 312
(Ct. App. 1993)
aff'd on other grounds
188 Wis. 2d 665 (1994)

1) SPD pays fees of experts if

a. Expert is engaged by SPD

§ 977.05(4r)
Brown Cty DSS v Lydia EC (In Int of Eileen KC)
172 Wis. 2d 512
(Ct. App. 1992)

b. Expert is engaged by SPD-appointed private Atty, and

- Atty follows SPD guidelines for reimbursement (prior approval and maximum reimbursement limit)

— Unless Ct must exercise its inherent powers because of an extraordinary circumstance

- Use of expert found to be essential to defense

J. Payment of expert/investigator fees—Def indigent but not eligible for SPD

St v Kirschbaum
195 Wis. 2d 11
(Ct. App. 1995)

1) Indigent Def has constitutional right to State's assistance in securing raw materials for effective defense

§ 885.10
Taylor v Illinois
108 S. Ct. 646 (1988)
St ex rel Dressler v Cir Ct
163 Wis. 2d 622
(Ct. App. 1991)

2) Indigent Def has constitutional right to have assistance of Trial Ct to compel attendance of witnesses and the right to put before jury evidence that might influence determination of guilt

a. Not an unfettered right, but subject to Ct's discretion upon finding that witness is proper and necessary

Taylor v Illinois
108 S. Ct. 646 (1988)

b. Def must make a plausible showing of a particularized need

- How proposed witness is material, and
- How proposed witness is favorable to his or her defense

2. Opinion Concerning Witness's Credibility or State of Mind

St v Huntington
216 Wis. 2d 671 (1998)
St v Romero
147 Wis. 2d 264 (1988)

A. No witness, expert or otherwise, should be permitted to give opinion that another mentally and physically competent witness is telling the truth

St v Kuehl
199 Wis. 2d 143
(Ct. App. 1995)

1) Basis of rule is lack of foundation or knowledge on which to premise belief as to another's truthfulness

St v Pittman
174 Wis. 2d 255 (1993)

2) Expert testimony that conveys expert's belief regarding veracity does not assist jury, but usurps its role

3) Belief as to veracity need not be express; testimony that amounts to an opinion that another witness is lying is inadmissible

St v Kuehl
199 Wis. 2d 143
(Ct. App. 1995)

4) When witness's testimony is inconsistent with that of another, examiner may not restate latter's testimony and ask witness if the other was not telling the truth or was mistaken

B. Exceptions

St v Jackson
187 Wis. 2d 431
(Ct. App. 1994)

1) When intended purpose or effect is to impeach, explain, or highlight differences in testimony, NOT to attest to another witness's credibility

St v Davis
199 Wis. 2d 513
(Ct. App. 1996)

2) When comment relates to another witness's out-of-court demeanor

St v Eugenio
219 Wis. 2d 391 (1998)

3) When victim's character for truthfulness attacked, prior consistent oral statements can be introduced under "rule of completeness"

St v DeSantis
155 Wis. 2d 774 (1990)
St v Bednarz
179 Wis. 2d 460
(Ct. App. 1993)

C. Expert testimony regarding post-assault conduct of sexual assault or battery victim does not contravene rule in Sec. 2.A., above, as long as witness does not comment on complainant's credibility

St v Jensen
147 Wis. 2d 240 (1988)
St v Hernandez
192 Wis. 2d 251
(Ct. App. 1995)
St v Richardson
189 Wis. 2d 418
(Ct. App. 1994)

1) Expert may describe behavior of victims and other commonly observed indicators of same type of crime to dispel common misperceptions or to inform as to how victims commonly act (*see* para. 3)a. below)

2) Relevant facts regarding complainant's post-assault behavior, including expert's description of that behavior, may be admitted as circumstantial evidence that assault occurred

3) Expert may then be asked if complainant's behavior consistent with that of other victims

St v Vinson
183 Wis. 2d 297
(Ct. App. 1994)
St v Richardson
189 Wis. 2d 418
(Ct. App. 1994)

a. Admissible as circumstantial evidence that assault occurred, especially if it explains context in which victim's statement was made, if it rebuts Def's suggestion that victim's charge is fabricated, or prevents false assumptions regarding meaning of complainant's behavior

St v Richardson
189 Wis. 2d 418
(Ct. App. 1994)

b. Comparison testimony not admissible if testimony has effect of expressing expert's belief as to

- Witness's veracity
- Witness's actual beliefs at time of offense
- Reasonableness of witness's beliefs
- Witness's state of mind before, during, or after event

St v Kirschbaum
195 Wis. 2d 11
(Ct. App. 1995)

4) Testimony regarding general concepts of memory, observation and perception, distortion, etc., is within Ct's discretion

5) Expert may testify as to susceptibility of young children to suggestive interview techniques and how such techniques can affect reliability of child's account of actual events

St v Richardson
189 Wis. 2d 418
(Ct. App. 1994)

6) Same test applies to Def's or State's expert

3. Expert Testimony on Capacity to Form Intent

St v Flattum
122 Wis. 2d 282 (1985)
St v Repp
122 Wis. 2d 246, 249
(1985)
St v Steele
97 Wis. 2d 72 (1980)
St v Morgan
195 Wis. 2d 388
(Ct. App. 1995)

A. Opinion evidence on Def's capacity to form a criminal intent, based in whole or part on mental health history properly excluded

1) Not competent, relevant, or probative

2) In both bifurcated and single-stage trials

St v Flattum
122 Wis. 2d 282, 305
(1985)

B. But non-opinion testimony as to Def's mental health history admissible, if otherwise relevant

St v Steele
97 Wis. 2d 72, 98 (1980)

1) As well as ordinarily admissible evidence on state of mind

§ 939.42(2)

4. Expert Testimony on Intoxication

St v Flattum
122 Wis. 2d 282, 293
(1985)
St v Repp
122 Wis. 2d 246 (1985)
Loveday v St
74 Wis. 2d 503 (1976)

A. Properly qualified expert on effects of intoxication may testify about effect of intoxication on ability to form intent

1) Only if testimony rests solely on Def's voluntary intoxicated condition

2) Cannot be joined to mental health history

3) In both bifurcated and single-stage trials

St v Mendoza
80 Wis. 2d 122 (1977)

4) Ct may restrict pathologist's testimony on behavioral effects of alcohol

St v Chitwood
2016 WI App 36, ¶¶ 33–
34, 369 Wis. 2d 132

B. Drug recognition expert is subject to *Daubert* analysis

St v Flattum
122 Wis. 2d 282, 296
(1985)

C. Apply § 907.02 as to qualification of expert and purpose of testimony

1) May be psychiatrist

2) May be other expert

Staples v St
74 Wis. 2d 13 (1976)

3) Def himself or herself not qualified to establish intoxication defense

Fischer v Ozaukee Cty
Cir Ct, 741 FSupp2d 944
(ED Wis 2010)

D. Expert testimony on intoxication—Expert may rely in part on PBT results in OWI cases

5. Expert Testimony on Post-assault Conduct

St v DeSantis
155 Wis. 2d 774 (1990)
St v Robinson
146 Wis. 2d 315 (1988)
St v Bednarz
179 Wis. 2d 460
(Ct. App. 1993)

A. In discretion of Ct, expert qualified by training or experience may testify on behavior exhibited by sexual assault victims

1) To educate jury when complainant's conduct attacked as inconsistent with sexual assault or domestic violence

2) Such testimony may serve useful purpose of disabusing jury of widely held misconceptions about

a. Sexual assault victims

St v Mayer
220 Wis. 2d 419
(Ct. App. 1998)

b. Victims of domestic violence

St v Mader
2023 WI App 35
408 Wis. 2d 632
pet for rev denied
St v Morales-Pedrosa
2016 WI App 38
369 Wis. 2d 75

3) Expert testimony on general statistics regarding false reporting may constitute impermissible vouching when considered with other testimony

St v Jensen
147 Wis. 2d 240 (1988)

B. Expert witness may be asked to describe behavior of complainant and then to describe behavior of victims of same type of crime, if testimony helps jury understand complainant's reactive behavior

1) Ct determines whether testimony will assist fact-finder understand evidence or determine fact in issue

2) Expert must not be allowed to convey to jury own beliefs as to veracity of complainant

St v Pittman
174 Wis. 2d 255 (1993)

a. The same test applies to the expert of the Def or State

3) Relevant facts regarding complainant's behavior after assault may be admitted as circumstantial evidence that assault occurred

6. Expert Testimony on Character

St v Walters
2004 WI 18, ¶ 44
269 Wis. 2d 142

A. Def may call expert regarding pertinent character trait

§ 904.04(1)(a)
St v Richard AP
223 Wis. 2d 777
(Ct. App. 1998)

1) Def may be permitted to call expert to testify that Def has no character traits consistent with a perpetrator of the alleged crime

St v Davis
2002 WI 75
254 Wis. 2d 1

2) If Def's expert testifies, implicitly or explicitly, to facts surrounding crime, Def waives right to self-incrimination, and State allowed to have its own independent examination of Def

7. Procedure If Challenge Raised

A. Hearing on motion in limine

St v Hogan
2021 WI App 24, ¶ 26
397 Wis. 2d 171

1) Trial Ct determines by a preponderance of evidence whether expert testimony is admissible

2) Before trial

a. Inherent authority of Ct to expedite trial

§ 971.23(1)(e), (2m)(am)

b. Production of statements (report) may be ordered before trial

3) Upon offer of testimony at trial

St v Dodson
219 Wis. 2d 65 (1998)

a. If hearing held, question-and-answer format recommended for offer of proof

CR 28: HYPNOSIS/POLYGRAPH/DNA

HYPNOSIS

Rock v Arkansas
107 S. Ct. 2704 (1987)
St v Armstrong

110 Wis. 2d 555 (1983)
St v Coogan
154 Wis. 2d 387
(Ct. App. 1990)

1. Per Se Ban Unwarranted in Criminal Trials

A. Before trial, Ct must determine admissibility of testimony "refreshed" by hypnotic session

B. Any party may use hypnosis to refresh witness recollection, provided

1) Subsequent identification and testimony not result of impermissibly suggestive hypnosis session, and

2) Adverse party allowed to present expert testimony regarding effect of hypnosis on memory

Armstrong v Young
34 F3d 421
(7th Cir 1994)

C. Def's rights to confrontation and due process not denied, provided

1) Def given opportunity to cross-examine witness subjected to hypnosis, and

2) Def permitted to introduce testimony on witness's prehypnosis recollection, and

3) Def permitted to introduce expert testimony regarding effect of hypnosis

St v Armstrong
110 Wis. 2d 555 (1983)

2. Procedure for Determining Admissibility

A. Notice

1) Proponent must notify adverse party of intent to use testimony of witness subjected to hypnosis

2) Notice must be given before trial

a. To allow motion to suppress

b. To allow for pretrial suppression hearing

B. Suppression hearing

1) Burden on proponent of use of hypnosis

a. To show reliability of testimony, and

b. To show reliability of identification

2) Ct to determine effect of specific hypnotic session on witness's testimony

a. Determination subject to Ct's discretion

b. Whether, as result of events occurring during hypnotic session, any subsequent statements made by subject should be considered so unreliable as not to be admissible at trial

c. Not a determination of reliability of hypnosis in general

3) Required findings

a. No impermissible or unnecessary suggestiveness occurred during hypnotic process, and

b. Statements resulting from hypnotic process reliable under totality of circumstances

C. Guidelines for determination of suggestiveness

1) Administrator of hypnosis should be mental health person with special training in use of hypnosis

a. Preferably psychiatrist or psychologist

2) Administrator should be independent and not be responsible to prosecution, investigators, or defense

3) Administrator should receive written memo with necessary facts

a. Should not be orally informed about case

b. Care should be exercised to avoid communication that might influence administrator's opinion

4) All contact between administrator and subject to be videotaped from beginning to end

5) No parties or their representatives to be present during hypnotic session

6) Administrator to examine subject before hypnosis

   a. To exclude possibility that subject physically or mentally ill, and

   b. To confirm subject possesses sufficient judgment, intelligence and reason to comprehend what is happening

7) Administrator to obtain detailed prehypnosis statement from subject regarding facts as subject believes them to be

8) Administrator to avoid adding new elements to subject's description of experience before, during, and after actual hypnotic session

9) Ct to consider any other evidence tending to corroborate or challenge information gathered during trance or as result of posthypnotic suggestion

D. Extent of compliance with guidelines not determinative of admissibility issue

1) Complete compliance does not guarantee admission of witness's testimony or identification

2) Noncompliance does not require exclusion

St v Coogan
154 Wis. 2d 387
(Ct. App. 1990)

3) Admissibility of hypnotically refreshed recollection discretionary with Trial Ct

E. Ct to determine reliability of statements under totality of circumstances

St v Armstrong
110 Wis. 2d 555 (1983)

1) Ct to consider possibility of confabulation

   a. When witness does not have complete memory of events and tends to fill gaps with information not really recalled

   b. Ct must consider effect of possible confabulation on witness's testimony

   c. Confabulation can occur even without hypnosis

2) Ct to consider other evidence which corroborates or challenges information obtained during trance or as result of posthypnotic suggestion

St v Armstrong
110 Wis. 2d 555 (1983)

3. Procedure When Testimony Found Admissible

A. If admissible for State

1) State may not reveal fact of hypnosis in case-in-chief

   a. Avoids risk of popular misconception by jury that hypnotized people always tell truth, and

   b. Allows Def an election to challenge witness's credibility

   - On grounds raising hypnosis issue, or
   - On other grounds, or
   - Both

2) Def may elect to challenge witness credibility by raising hypnosis issue

   a. By cross-examination of witness

   b. By introducing witness's prehypnotic testimony

   c. By expert testimony concerning reliability and effect of hypnosis on memory

3) If Def raises hypnosis issue, State may introduce expert testimony in rebuttal to counter Def's challenge

4) If Def does not elect to challenge witness credibility by raising hypnosis issue

   a. State may not reveal to jury fact that witness's recollection refreshed by hypnosis

   b. State may not introduce expert testimony on hypnosis in rebuttal

Recommendation

B. If admissible for defense, same criteria as above, but roles reversed

POLYGRAPH

§ 905.065

1. Discovery of Polygraph Results

§ 905.065(2)

A. Privileges of subject of polygraph examination

1) Subject may refuse to disclose information

2) Subject may prevent others from disclosing information

§ 905.065(4)

3) Exception

a. Discovery permitted if written agreement exists between subject and person administering examination, provided

- Agreement valid, and
- Agreement voluntary

§ 905.065(2)

B. Information protected against discovery

1) Any results of examination, and

2) Any oral or written communications during examination

§ 905.065(3)

C. Privileges may be claimed by

1) Subject of examination, or

2) Subject's guardian or conservator, or

3) Subject's personal representative, if subject deceased

St v Dean
103 Wis. 2d 228 (1981)

2. Polygraph Results Not Admissible in Any Criminal Proceeding

US v Scheffer
118 S. Ct. 1261 (1998)
St v Wofford

202 Wis. 2d 523
(Ct. App. 1996)

A. Testimony that inferentially puts the results of a polygraph before jury is inadmissible

St v Stanislawski
62 Wis. 2d 730 (1974)

B. Exception: Admissible only if *Stanislawski* stipulation executed on or before September 1, 1981

C. *Stanislawski* stipulation requirements

1) In writing after charges filed

2) Signed by DA, Def, and Def Atty

3) Providing for

a. Def's submission to polygraph

b. Subsequent admission at trial of graphs and examiner's opinion

4) May apply to witnesses as well as Def

St v Mendoza
80 Wis. 2d 122 (1977)

D. Admissibility hearing considerations

1) Manner in which test given

2) Sufficiency of data on which conclusion based

3) Qualifications of examiner

McLemore v St
87 Wis. 2d 739 (1979)

4) Defense may present experts to impeach examiner

E. Examiner may be cross-examined at trial

St v Mendoza
80 Wis. 2d 122 (1977)

1) Ct has discretion to prevent party from calling expert impeachment testimony

St v Stanislawski
62 Wis. 2d 730 (1974)

F. Cautionary jury instruction required when results of test admitted

3. Postpolygraph Statements

A. Case-in-chief

St v Vice
2021 WI 63, ¶ 25
397 Wis. 2d 682
St v Davis
2008 WI 71
310 Wis. 2d 583

1) May be admissible if statement separate in time and content from the mechanical polygraph examination

a. Whether separate or distinct determined by consideration of totality of circumstances; no dispositive, bright-line rule

b. Factors may include, without limitation

- Interview's temporal proximity to actual test
- Discrete exam/interview rooms
- Whether references to exam were made during interview
- Whether Def was told exam was over
- Whether references made to failed exam to elicit inculpatory statements
- Whether officer conducting exam differed from officer conducting interview

2) If separate in time and content, general rules of admissibility apply

St v Vice
2021 WI 63, ¶ 36
397 Wis. 2d 682

a. Voluntary

- Reference to polygraph results during post-polygraph interview is not per se coercive; must consider totality of the circumstances

b. Noncustodial/*Miranda* compliance

§ 904.02, § 904.03

c. Relevant and not prejudicial

B. Statement used to impeach Def

St v Johnson
193 Wis. 2d 382
(Ct. App. 1995)
St v Pickett
150 Wis. 2d 720
(Ct. App. 1989)

1) Statement inadmissible as too closely associated with actual test, admissible to impeach Def

2) Statement must be voluntary; not "compelled"

St v Pickett
150 Wis. 2d 720
(Ct. App. 1989)

3) Ct should give cautionary instruction to consider statement only for impeachment purposes and not as substantive proof of facts in Def's statement

St v Hoffman
106 Wis. 2d 185
(Ct. App. 1982)

4. Offer to Take Polygraph Examination

A. Offer admissible

1) When offer relevant to assessment of offeror's credibility, and when purpose for introducing offer limited to credibility

St v Santana-Lopez
2000 WI App 122
237 Wis. 2d 332

a. May reflect "consciousness of innocence"

St v Shomberg
2006 WI 9, 288 Wis. 2d 1

2) Def must demonstrate that Def believed that a polygraph was possible, accurate, and admissible

St v Shomberg
2006 WI 9, 288 Wis. 2d 1

3) If Def merely agrees to take polygraph, as opposed to offering to take polygraph, not admissible

St v Pfaff
2004 WI App 31, ¶ 29
269 Wis. 2d 786

4) If offer to submit to a polygraph is made at request or suggestion of Atty, it is not probative as consciousness of innocence and therefore not admissible

St v Hoffman
106 Wis. 2d 185
(Ct. App. 1982)

B. Withdrawn offer admissible

1) When withdrawn offer relevant to assessment of offeror's credibility, and

2) When purpose for introducing withdrawn offer limited to credibility

DNA

1. Definition

§ 939.74(2d)(a)

A. "Deoxyribonucleic acid profile" means an individual's patterned chemical structure of genetic information identified by analyzing biological material that contains the individual's deoxyribonucleic acid

2. Introduction of DNA Evidence at Trial

§ 971.23(9), § 972.11(1)
St v Peters
192 Wis. 2d 674
(Ct. App. 1995)

A. Proponent's action

1) Proponent notifies other party in writing at least 45 days before trial date and provides other party, within 15 days after request, with material relating to DNA evidence

a. Ct to exclude evidence if notice and production deadlines not met, UNLESS

- Ct waives 45-day notice requirement, or
- Ct extends 15-day production requirement

b. Ct may waive or extend time if parties stipulate, or for good cause, and Ct finds no party will be prejudiced by waiver or extension

B. If other party makes request, they must receive, within 15 days after request

§ 971.23(1)(e)
St v Thomas
150 Wis. 2d 374 (1989)
St v Copening
100 Wis. 2d 700 (1981)

1) Any relevant written or recorded statements of a witness named under § 971.23(1)(d), and

a. Any audiovisually recorded oral statement of a child under § 908.08

b. Expert reports or summaries including

- Physical exams
- Mental exams
- Scientific tests or comparisons

C. Ct may grant a continuance to provide exchange of information

St v McCoy
2007 WI App 15
298 Wis. 2d 523

D. State must establish chain of custody

3. Offer to Undergo DNA Testing

St v Santana-Lopez
2000 WI App 122
237 Wis. 2d 332

A. May reflect "consciousness of innocence"

4. DNA Sampling

A. At arrest. *See* CR 7, Sec. 3

B. Upon conviction. *See* CR 37, Sec. 1.R.

§ 973.047(1f)

1) Upon any criminal conviction, DNA sample required. If not already on file with DOJ, see **CR 37**

2) Inform Def of right to request expungement under § 165.77(4) if conviction reversed, set aside, or vacated